UNITED STATES
CUSTOMS COURT REPORTS

VOLUME 79

CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

July–December 1977

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UNITED STATES CUSTOMS COURT

Chief Judge

EDWARD D. RE

Judges

PAUL P. RAO
MORGAN FORD
SCOVEL RICHARDSON
FREDERICK LANDIS
JAMES L. WATSON
HERBERT N. MALETZ
BERNARD NEWMAN
NILS A. BOE

Senior Judge

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PROCEEDINGS

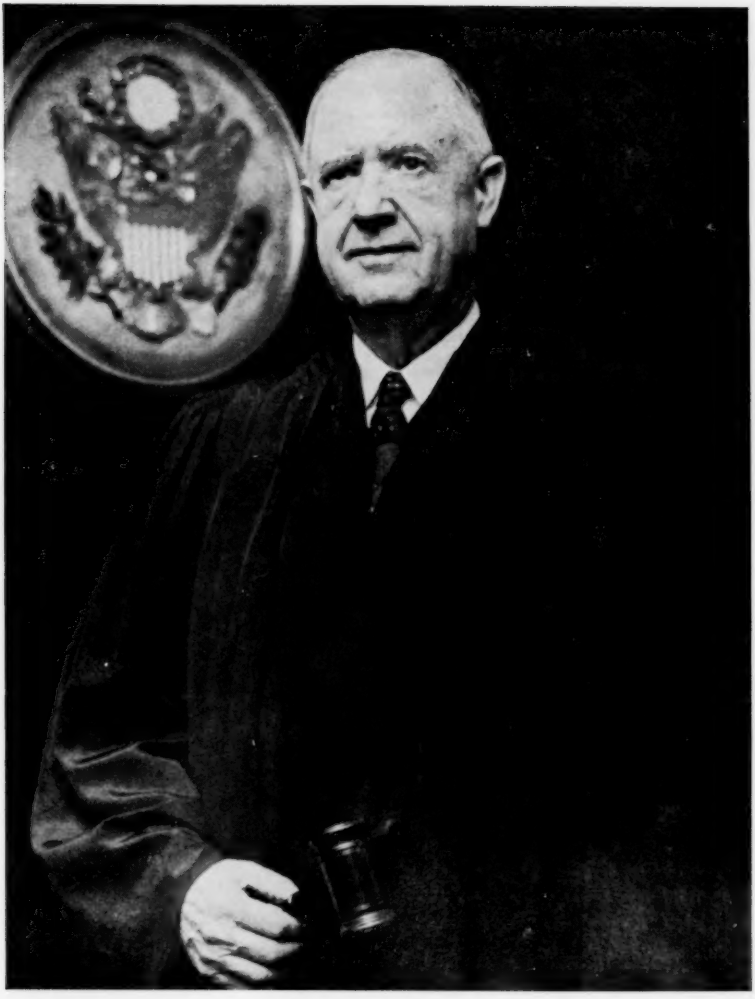
UNVEILING CEREMONY
OF
THE PORTRAIT
OF
JUDGE JED JOHNSON

United States Customs Court

One Federal Plaza

New York, New York

December 16, 1977



Chief Judge RE: This special session of the United States Customs Court is convened for the purpose of accepting the gift of a portrait of a former distinguished member of this Court, the Honorable Judge Jed Johnson.

For this ceremony, I had the great privilege of appointing a Committee of Judges of this Court. The Committee consists of Judge Morgan Ford, Judge Scovel Richardson and Judge Bernard Newman.

Before turning the program over to the Committee, I should like to acknowledge the presence of my distinguished colleagues on the bench—Judge Paul P. Rao, Judge Morgan Ford, Judge Scovel Richardson, Judge Frederick Landis, Judge Herbert N. Maletz, Judge Bernard Newman and Judge Nils A. Boe.

And now, it is a distinct pleasure and privilege to present Judge Morgan Ford, Co-Chairman, together with Judge Scovel Richardson, of the Committee and a former colleague of Judge Johnson.

Judge Ford.

Judge FORD: Chief Judge Re, my brother members of the Court, members of the Jed Johnson family, my brethren of the bar, distinguished guests and friends:

On behalf of the Court, may I extend to each of you a most cordial welcome as we convene to honor a former Judge of this Court, the Honorable Jed Johnson of Oklahoma.

The Court is pleased to note the presence not only of the four children of Judge Johnson and their spouses, but also all of the grandchildren, who, I am advised, are now eight in number. The members of the family have gathered here this afternoon from far and near, including Oklahoma, Louisiana, New Hampshire, Washington, D.C., Maryland, California and England. It would please the Court if all the members of the Johnson family would rise and take a bow. (Applause.) Thank you.

I recall my first visit to Judge Johnson's home back in 1949, for he was the first judge then on the Court to invite me to his home for dinner. It was then that I first learned of the famous Johnson Chili. During the middle and late 50's, Mrs. Ford and I had the honor to live next door to the Judge and his charming wife at Number Two Fifth Avenue here in New York City, and we enjoyed many a bowl of that good Johnson Chili as guests in the Johnson home. I have

never been able to ascertain whether this was a family recipe, an Oklahoma recipe, a Chickasha recipe, or perhaps even from Lawton, but Mrs. Ford and I have often yearned for more of it.

During the Judge's 16 years as a member of this unique and specialized national court, I had the honor to know him for 14 of those years, not only as an esteemed jurist, but as a warm and dear personal friend. Judge Johnson was the 22nd Judge named to this Court. He was, however, the first and only jurist ever to serve on this Court from the State of Oklahoma. His record on the Court speaks well for his native State.

Like most Americans, and certainly like most Federal judges, he was a man of humble origin. He enjoyed many noble traits of character which endeared him not only to his brothers on the bench and his brethren of the bar, but to the Nation he served so admirably and so well.

It may be of interest to you members of the family to know that your father holds a unique record in this Court. While holding a session of Court in Honolulu, your father admitted 90 lawyers to practice, a record that has never been equalled before or since.

Nature blessed him with an excellent mind. The members of the Court knew him as a man who was farsighted in his judgment of men. We knew him as a man who lived a life of self-control, a life full of purpose, and a life filled with generous thoughts and deeds.

To you eight grandchildren, let me state that while your grandfather is now resting in the vineyards of time, I know you will remember him for what he was—soldier, editor, lawyer, statesman, legislator, both State and Federal, and a Federal Judge. While he was all of these things, he was above all a God-fearing family man—one who led the good life—one who set the good example.

To you children of the good Judge, I don't have to tell you how much your father loved you. He spoke often of all of you—always with admiration and affection. It seems, therefore, only natural that you should respond by honoring your father here this afternoon.

Let his memory be and remain a shining light for all of us in the years that lie ahead.

It is an honor for me to present at this time Judge Scovel Richardson, the Co-Chairman, who will act as Chairperson for the unveiling ceremony. Judge Richardson and Judge Johnson were long-time friends. They served together for several years on the then Third Division of this Court. It may well be said that in a legal sense, Judge Richardson knew Judge Johnson better than any other member of the Court.

Ladies and Gentlemen, Judge Richardson.

Judge RICHARDSON: Chief Judge Re, Judges of the Customs Court, members of the family of Judge Johnson, members of the bar, Ladies and Gentlemen:

Jed Johnson wanted to be a part of our national government, and prepared himself through education at the University of Oklahoma, serving as the editor of a county newspaper, engaging in the practice of law, and serving two terms as an Oklahoma State Senator. He was then ready for "Capitol Hill", and was elected to the 70th Congress. Congressman Johnson liked the challenge of the Halls of Congress, and apparently his constituents liked him, as they reelected him to the 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th and 79th Congresses. He served as Chairman of the powerful House Steering Committee, the Committee that steered much of the New Deal Legislation—Social Security, Home Loan Bank Board, National Labor Relations Board, etc.—through the Congress.

As an extracurricular activity he served as Chairman of the Speakers' Bureau of the Democratic National Congressional Committee, where he helped to make it so difficult for my Republican friends in their efforts to gain control of the Congress.

He was appointed a judge of the United States Customs Court by President Harry S. Truman in 1947, and served with distinction as a Judge and Presiding Judge of the Third Division of this Court for 16 years.

Shortly after my nomination to serve as a Judge of the United States Customs Court was confirmed by the Senate, in April, 1957, I received a warm letter of congratulations and welcome from Judge Jed Johnson, the Presiding Judge of the Third Division of the Court, to which I had been assigned.

When I arrived at the Court, he carried me to lunch and explained how the Court functioned, and the Third Division in particular. He explained to me many of the things a new judge needed to know by way of background, and suggested some reading materials including a very scholarly and helpful article entitled "The United States Customs Court—Its History, Jurisdiction and Procedure" by Judge Jed Johnson, and, wouldn't you know, it was published in the Oklahoma Law Review. We didn't have a Customs Law Digest at the time, and the Presiding Judge was kind enough to give me a list of leading customs cases that enabled me to catch step with my colleagues in the Third Division. He informed me that there was a vacancy on the Rules Committee and suggested that I indicate my availability to Chief Judge Webster Oliver so I could get a good insight into the flow of the work of the Court.

He was very fair in his assignment of cases and saw to it that each of us in the Division received some of the tough cases and some that were not so tough.

On the bench, when you were scheduled to write an opinion, he permitted you to conduct the major portion of the trial.

He was always attentive to what opposing counsel had to say. He was particularly patient with and considerate of young attorneys trying their first case.

Judge Johnson's opinions in many difficult customs matters reflected his keen insight into legal issues and the distillation of his rich experience as a practicing attorney, a legislator and a judge.

He did do two things, however, that bothered me from time to time. He would sometimes dissent from my opinions, and after I exerted every diligence to get around his dissent, I would frequently have to confess that he was right. The second bother was when he and a colleague would write different opinions, I found myself invariably agreeing with Judge Johnson. It got to be embarrassing for me and I went in and told him so. All I got out of him was a big smile. Once when I thought I had a case in which I could go along with my other colleague and not agree with Judge Johnson, the Court of Customs and Patent Appeals promptly reversed us. He took me to lunch and gave me another one of his big smiles.

Neither Judge Johnson nor the other colleague is here to affirm or deny my allegations, but Miss Sturm, his former law assistant, an eye witness, is present and can verify what I have said, should someone wish to question her. Also, the Customs Court Reports are available if someone wants to see my allegations verified in writing.

My association with Judge Johnson off the bench was as pleasant and rewarding as it was on the bench. We frequently had lunch and took walks together. On some occasions I accompanied him to Madison Square Garden to hear Billy Graham. When each of us was away on circuit, we kept in touch by phone or correspondence.

The Judge was Chairman of the Committee on Legislation, and when he felt that the time had come for the Judges to have control of their own chambers and a definitive voice in the operations of the Court, he drafted and received unanimous approval of the Judges of what later became known as S. 1947, which he and Judge Ford went to Washington and got Senator Langer to introduce. When he and Judge Ford had to leave on circuit and the Congress was heading for adjournment he asked me to monitor the progress of the Bill in Washington, first in the Senate, and after passage there then to get the House to consent to the Senate Bill without amendment, as time was of the essence. Our correspondence was heaviest between July and September, 1959. I think every Congressman known and unknown to Judge Johnson received a letter from him urging support of the Bill.

Happily, S. 1947 became Public Law 86–243, which is a monument to Judge Johnson's vision and sense of sharing.

He also gave generously of his time, energy and talents in helping to formulate the plans for this beautiful edifice which houses our Customs Court.

One didn't spend much time with Judge Johnson without realizing his belief that the future of America depends upon a strong family structure as a base. He made his contribution toward this goal. He and Mrs. Johnson were justly proud of the young, growing lives of their children. To him the most satisfying thing in life is to love and be loved in return. He loved his family, and the presence of all of his children on this occasion is tender testimony that he was loved by them in return.

Presiding Judge Jed Johnson was proud to serve on the Customs Court, and those of us who were privileged to serve with him had deep affection for him, and all of us are indebted to him for his many fine contributions to customs law and to this Court.

The next person who will speak to you is Judge Paul P. Rao, who is the most Senior Judge of this Court, having been appointed by President Truman in 1948, and he has also served as Assistant Attorney General in charge of Customs, from 1941 until he assumed the bench. He is also a former Chief Judge of this Court. Judge Paul P. Rao.

Judge RAO: Chief Judge, Judges of the Customs Court, and members of the Johnson family, members of the bar, Ladies and Gentlemen:

I am delighted to be able to say a few words about my colleague and friend, Jed Johnson, but how does anyone who has been privileged to know him say, in a few minutes, all that he would like to say about a distinguished jurist, a loving husband and father, and one who gave so much of himself to the United States Customs Court. Because we, today, are enjoying what he wanted most—a building for our Court.

I am sure some of you are aware of the important part he played in bringing about the completion of our beautiful Courthouse here at Federal Plaza, as well as the Federal Office Building. He was always ready to assist in improving the facilities of the Court and the administration of justice.

I personally wish to thank the Johnson family for presenting this portrait of our former colleague, as well as the Customs Bar and to the Court—so that it may adorn this magnificent Courtroom, along with the portraits of Chief Judge Webster Oliver, Judge Lawrence, Judge Wilson and Judge Mary Donlon Alger.

Let me read to you a letter which will give you an insight into the temperament of Jed, dated April 10, 1961, wherein Judge Johnson replied to Chief Judge Webster Oliver after serving on the Federal bench for 15 years.

"Dear Judge Oliver:

Your memorandum dated April 6 received. I note with interest that you say, "It is my opinion that a photograph of the present Court should be taken," adding that you will try to arrange a time when the entire membership of the Court will be in New York.

When I was nearly fourteen years younger, my shoulders much more erect, my hair a lot less gray, the wrinkles in my face not so deep nor half so numerous, when I walked more erectly with considerably more spring in my step, and had actually kidded myself into believing that I was not a bad-looking man, I suggested at one of our Court meetings that a photograph of our distinguished Court be taken. But there seemed to be little if any sentiment for it at that time. Whether or not all of our members would desire a picture of the Court at this time, I of course do not know.

But now I must confess my "youthful" enthusiasm for photographs has long since been on the wane; in fact I have not had the nerve to face a camera for years. However, I have no objection to posing with my handsome and learned colleagues; in fact, would treasure such a picture. I would want to know, first, what the exact cost of each picture would be, and whether or not the cost of such a project would be borne by the Court.

Your colleague,
Jed Johnson"

With your permission, I should like to recite a few lines from one of my favorite poems, which, in my opinion, best describe our beloved Jed.

"He lived for those who loved him,
For those who knew him true,
For the Heaven that lies above him
And awaits his coming, too,
For the cause that needed assistance
For the wrongs that needed resistance,
For the future in the distance,
And the good that he could do."

Thank you,

[Applause.]

Judge RICHARDSON: We have with us this afternoon, Mr. J. C. Kennedy, who is here representing the State of Oklahoma. He is former Head of the Transportation Department of that State, and presently serving as delegate to the U.N., under appointment by President Jimmy Carter. He was a close friend of Judge Johnson and the Johnson family, Mr. Kennedy.

Mr. KENNEDY: Honorable Court, the Johnson family, Ladies and Gentlemen:

I bring greetings from Governor David Boren and the People of Oklahoma, along with instructions to me that I acknowledge to this

group their appreciation for the unveiling of Jed Johnson's portrait. His memory is still well impressed in the minds of a great number of Oklahomans, and in fond memory of Jed Johnson, the People of Oklahoma have named a lake in his honor—Lake Jed Johnson, located in the Wild Life Refuge. This lake is a constant reminder to the people of the character of Jed Johnson, and his political philosophy. His public service was dedicated to the underdog and all who needed help. He saw everyone in his travels in his district and all who came to Washington. This is a distinction that represents the best in public service. He served us well.

One of the great members of the current Congress, Jim Wright, the present majority leader, has said that the first political speech he ever heard was delivered by Jed Johnson in the Oklahoma Sixth Congressional District, when Congressman Wright, as a child, was a visitor there, with his parents. Some of the biography of Jed Johnson, which we all here know, began with his graduation from the University of Oklahoma School of Law. In 1915, he was Editor of a newspaper, but he began his practice of law in Walters, Oklahoma, and later served his country well during World War One. He was first elected to the Oklahoma State Senate in 1920 and served with distinction in that position until elected to Congress in 1926, where he served with still more distinction for 20 years.

One of his favorite Committees was Appropriation. In 1948, I find in his resume, he was appointed by President Roosevelt to this Court and reappointed by President Truman, where he served until his death in 1963.

Jed was especially proud of his participation in the Peace Conference and the Interparliamentary Union in Paris, in 1927 and 1929, and in Geneva in 1937. He served as Chairman of the Speakers Bureau of the Democratic National Convention, speaking himself throughout the country.

In early childhood, he was so impressed when he heard a Congressman making a speech at his grade school that on returning home, he told his mother that his ambition would be to become a Congressman, and he really devoted the balance of his education to that end.

In closing, I want to say that he will always be remembered as a dedicated public servant who served his State and his Nation well.

[Applause.]

Judge RICHARDSON: Mr. Ellsworth Qualey was just a well-prepared young practicing attorney with the firm of Rode and Qualey when Jed Johnson was Presiding Judge of the Third Division, and had many occasions to appear before him.

Since that time, he has become the Chairman of the Subcommittee on Taxation of the American Bar Association that deals with customs

matters, and he is a member of the Standing Committee on Customs Law of the American Bar Association, and presently the President of the Customs Bar Association. He will speak, and we will unveil the portrait.

Mr. QUALEY: Chief Judge Re, Members of the Customs Court, Members of the family of the late Judge Johnson, and Ladies and Gentlemen:

I am here today not only as the President of the Association of the Customs Bar, which is a nationwide organization of lawyers whose practice is principally devoted to customs and tariff matters, but also as a practitioner, as Judge Richardson has said, in the Third Division of this Court, as it was then known.

You have all heard of the distinguished career of Judge Johnson, not only as a Congressman, but as a Judge of this Court—and I would like to make a few personal remarks about Judge Johnson's conduct in the Third Division.

In those days, we had a Third Division consisting of three Judges, of which Judge Richardson was one, Judge Johnson was the Presiding Judge—and I practiced before that Division for many years. Throughout all those years, I learned to know Judge Johnson as a man of unfailing courtesy, a man of great kindness, a man who was considerate, not only of counsel that appeared before him, but of the witnesses as well. He was very sympathetic to and understanding of the problems of the practitioners, and he was a patient man with an innate sense of justice and fair play. He was a kindly man, and all those who practiced before him learned to love him. It was a pleasure indeed to practice before him. In every sense of the word, he was a genuine, true gentleman, and a man of whom his family can well be proud.

It is my pleasure to make these remarks in honor of Judge Johnson. [Walking toward portrait.]

At this time, I would like to unveil the portrait of Judge Jed Johnson.

[Unveils portrait.]

Chief Judge Re, on behalf of the family of Judge Jed Johnson, I wish to present this portrait to the United States Customs Court.

Chief Judge RE: It is with great pleasure that I accept this portrait on behalf of this Court and the United States Govern nent. I thank you for presenting it on behalf of the Association of the Customs Bar, and the Johnson family, for having contributed it.

Thank you so very much.

Judge RICHARDSON: The next speaker is a lady known not only for the quality of her work, but for the length of her tenure, as a law as-

sistant, and one who served as Judge Johnson's law assistant. She has made a monumental contribution to Customs Law by the publication of a Manual of Customs Law that is an aid not only to the uninitiated in the trial of a customs case, but to all of us working in the area of Customs and Tariff Law.

Miss Ruth Sturm.

[Applause.]

Miss STURM: Chief Judge Re, your Honors, members of the Johnson family, attorneys, members of the bar, and friends of Judge Johnson:

When I think of Judge Johnson, I see a warm, friendly man with piercing blue eyes, who always came into the office with a big smile. When he was in a really good mood, it would overflow to all of us and we would share his high spirits.

He was never a man who kept his office in a separate compartment. Everything that went on was shared with us. We knew his interests, and they were many. He always kept his office door open.

He was, first of all, a family man, as I think has been mentioned by everyone here. He was always doing something for Mrs. Johnson and for the children. I think he got the biggest kick out of the appointment of Jed, Jr. as a page in Congress, because part of his heart was always in Congress.

He had a little book which had the pictures of the Congressmen from a certain year, and he used to write little notes about them. The Congressional Record came into the office regularly. He would never throw it away, and it piled up until finally we had to sneak some of it out because there was no room for it. He thought it was part of the history of the United States and should be kept.

After he came to the Court, he developed a great interest in it, too.

His article in the Oklahoma Law Review has already been mentioned. It is of historical interest because it describes the procedures of the Customs Court prior to the amendments in 1970. In looking over it the other day, I also noted an item of current interest, in that it cites a case involving the question of whether merchandise that was shipped from the Panama Canal Zone to an Army Post in Hawaii was dutiable. The Judge discussed the case and noted that it indicated "that the Canal Zone still remained foreign soil," and that the United States, under the treaty, merely had jurisdiction over it. Some of our friends who are arguing about the Canal Zone might look at this case.

As was mentioned, Judge Johnson was a member of the Jurisdiction and Legislation Committee. Since there is interest in increasing the jurisdiction of the Court, I went over a little memorandum he

wrote in which he noted that this Court is very concerned with merchandise and had a good deal of expertise in it. Therefore, he suggested that it should get some of the Food and Drug cases. That is one of the things that is now being considered. So, he was a little bit ahead of his time.

When Judge Johnson came on the bench, each Judge was assigned certain subject matter-jurisdiction. One of the cases that came before him in his early days involved the question of the dutiability of certain quantities of liquor. Congress had just changed the law so that duty was assessed on the quantity withdrawn for consumption and not the quantity exported. Being a teetotaler, Judge Johnson did not like this at all and said it was a windfall for the liquor interests.

Judge Johnson was also assigned cases on shortage and reliquidation for fraud. His decisions on these established the requirements of proof in such instances.

Another case I remember involved coffee cups and saucers of various types, sizes and shapes. The question was whether they were tableware or not. The Court held they were not because they were not chiefly used as tableware but as decorative items. This decision was affirmed by the United States Court of Customs and Patent Appeals, and is cited very frequently.

The Judge sometimes put a few personal touches in his opinions. In one, he said every country boy who ever went hunting for frogs knew that a frog was not a fish.

He thought Court rules should be short and simple and that the judges should interpret them in their discretion.

He was a religious man, taught Sunday School, and went to the Billy Graham Crusade faithfully when it was in New York.

He was fond of public speaking and prepared a speech by dictating it, having it typed in draft, and then on cards. He would go over the cards and put them in his pocket, but they didn't come out. He spoke from memory.

Once he was called upon to introduce Dr. Poling, and found a long column of his activities in Who's Who. I said, "You're not going to use all of that, are you?" He said, "Yes, I think he would like that." He looked a little sheepish when he came in the next morning, and said, "I forgot one thing; I forgot to mention his wife."

I will close by telling you one of the stories he often told. When he was a little boy, he said, people called phrenologists used to come to Oklahoma. They would feel the bumps on a person's head and tell what he was going to do and how successful he was going to be. Once such a man examined the boys in the Johnson family. When he came to Jed, he felt him and he felt him and he felt him, and shook his head.

Jed's mother said, "Well, what about it, what about this one?" Finally he said, "Well, ma'm, I regret to tell you, but this boy is going to a politician." You can imagine the glee with which Judge Johnson told this story. You had to hear him tell it. He was a wonderful story-teller.

He was an unforgettable character in the nicest, warmest sense of the word. He lived a good life and he enjoyed it. He left us a wonderful memory of a man who gave a lot of himself to everything he did, as a statesman, as a Judge, as a family man, and as a friend.

[Applause.]

Judge RICHARDSON: The next speaker is one who has had the privilege of working both before the bench and behind the bench, so to speak. She served on the Assistant Attorney General's staff, as a trial lawyer in Customs cases, in the Department of Justice, and then she transferred to the Customs Court and was a law assistant, and now, she has returned to the duties in the Department of Justice. She had occasion to try cases before Judge Johnson in the Third Division. We have heard from Mr. Qualey, who represents the Customs Bar, and now, we would like to hear from a government attorney who had the privilege of trying cases before Judge Johnson. Attorney Sheila Ziff.

Mrs. ZIFF: Chief Judge Re, Members of the Customs Court, Members of the Johnson family, Ladies and Gentlemen:

Yes, I tried cases before Judge Johnson, and it was a great privilege to do so. I was assigned to the Third Division when I came, and tried my first case in this Court before him. I also was fortunate enough to be assigned the Texas dockets and Judge Johnson, who originally came from Texas, used to go on those dockets, too. So, I did get to know him a bit, as well as his very charming wife, Mrs. Johnson, and I'd just like to mention her. She always went with the Judge on these trips. She was a very lively, chirpy, bright lady, with a good sense of humor, and she always enlivened the occasion when sometimes lawyers from both sides had dinner with the Judge and Mrs. Johnson. And I would add that, although he was a teetotaler, the Judge happily did not require the same abstinence of others who were with him.

I can attest to those qualities about which the preceding speakers talked. He was, indeed, everything that they have mentioned. I came down earlier this morning to get a sneak preview of the portrait. I was very curious to see it, and when I looked at it closely, I thought that it shows the qualities for which I remember him. I could see the courtesy, the kindliness, the glint of humor, the finely honed intelligence. It is a fine portrait, and we are very fortunate to have it in this Court.

I would like to mention something about the chili. I used to hear a great deal about it, and I asked the Judge for the recipe and if

Judge Ford or anybody else wants it, I will be glad to give it to him. But, I must warn you—it begins: "Take one large jar of Gebhardt's Chili Powder." It's a recipe known to Texans.

It was really a privilege to appear before Judge Johnson, who added great luster to this Court.

[Applause.]

Judge RICHARDSON: Now we will hear from Congressman Jed Johnson, Jr. His interest in national and international affairs developed very early. He majored in history and government at the University of Oklahoma and, in his senior year, was elected National President of the United Nations Clubs of the colleges and universities throughout the country.

He was a great believer, like his father, in peace on earth, and felt that the first step began with him, and he devoted a good deal of his time and interest to peace matters. Then, as soon as he reached the age when he could run for Congress, he decided to run, and was elected. He hadn't been in office long when I dropped in to see him on a matter, and I found him to be as gracious and attentive to my concerns as if I were one of his constituents from Oklahoma.

Jed Johnson, Jr.

Mr. JOHNSON: Chief Judge Re, Judge Ford, Judge Richardson, Judge Rao, and other members of the Court, and Ladies and Gentlemen:

On behalf of the family, I would like to thank you, Judge Re, for arranging this ceremony today, which has great meaning to all of us in the Johnson family.

I would like to say a special word of thanks to Judge Ford, who really was someone very special to my father, and I think he thought of Judge Ford as a brother more than as another judge on this Court. And I want to say a word of appreciation to Judge Richardson and Judge Rao, who also served with my father, and he felt a great sense of kinship and friendship toward them. And I want to thank Judge Newman for making arrangements for this occasion. And I want to thank Miss Sturm, his law expert, and Mr. Kennedy and the others for coming here and speaking.

Here, I want to solve the mystery of the chili. My father had a brother in San Antonio, Texas, and that recipe came in from his wife, and that came from Mexico. So, it is a Mexican chili recipe.

My father loved the Congress and, as was mentioned, he wanted to go to Congress, and he did, and served there for 20 years. But, he also loved the Customs Court, and it was one of his dreams that one day, the Customs Court would have its own building. And it was one of the things he was most keenly interested in, in the last years of his life—

that this Court might have its own building. It seems to me especially fitting that his portrait should hang here in these chambers.

And, Miss Sturm, remembering my father's admonition—to be a good speaker, you must stand up, speak up, and shut up. And remembering these things, I will now say, thank you.

Chief Judge RE: I did not have the privilege of knowing Judge Johnson, but I have learned a great deal this afternoon. I am pleased with the portrait. It is obviously the portrait of a man of character and stature.

My role is a very happy one—first to thank all of my colleagues for being with us, and second, to thank the family for being here, and for their generosity in making this beautiful portrait available to the Court. Also, I wish to thank each of the speakers.

I believe the speakers have earned a round of applause.

[Applause.]

I thank all of you for being here. As a teacher, I would say that we can have no class without students. So, I thank you, the audience, for having come.

I should like also to thank the Committee of the Court that made the arrangements for these ceremonies: Judges Ford, Richardson, and Newman. Please note the cooperative spirit that prevails among all of our colleagues. Judge Ford undertook to bring us all together. He played the important role of getting things started. Judge Richardson presented us with marvelous biographical data on Judge Johnson. His was the role of historian. All of us will be the beneficiaries of the social talents of Judge Newman, because he arranged the reception to which you are all invited in the Judges' Dining Room. So, I hope that you agree that the Chief Judge acted wisely when he selected the Committee for these ceremonies.

I shall now ask the Marshal to close this special session of the Court, and look forward to the pleasure of seeing you in the Judges' Dining Room.

Customs

(C.D. 4705)

E. R. SQUIBB & SONS, INC. *v.* UNITED STATES

Electric toothbrushes

UNFINISHED TOOTHBRUSHES—BROXODENT DEVICES—GENERAL INTERPRETATIVE RULE 10(h)

Merchandise described on the invoices as "Broxodent devices (electric toothbrushes)" consisting of the power or motor units of Broxodent electric toothbrushes, without brushheads, were properly classified by the Government under item 750.40, TSUS, as unfinished toothbrushes pursuant to General Interpretative Rule 10(h). The absence of a brushhead, comprising 1 percent of the cost of a complete Broxodent electric toothbrush, did not preclude classification of the imports as unfinished toothbrushes. *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109 (1973), distinguished. *F. W. Myers & Co., Inc.* v. *United States*, 57 CCPA 87, C.A.D. 982, 425 F. 2d 781 (1970), cited.

ABSENCE OF TARIFF PROVISION FOR PARTS OF TOOTHBRUSHES—RATIONALE OF AUTHENTIC FURNITURE NOT DISPOSITIVE

Since there is no express provision in the tariff schedules for parts of toothbrushes which would be rendered ineffectual by classifying the imports as unfinished toothbrushes, and the competition is between an *eo nomine* provision for toothbrushes (unfinished) and the basket provisions in items 688.40 and 678.50, TSUS, the rationale applied in *Authentic Furniture* to distinguish parts of furniture from unfinished furniture is not dispositive in the present case.

Court No. 73-9-02547

Port of New York

[Judgment for defendant.]

(Decided July 1, 1977)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

NEWMAN, Judge: The within action was previously before this court on cross-motions for summary judgment, which were denied

without prejudice. *E. R. Squibb & Sons, Inc.* v. *United States*, 75 Cust. Ct. 193, C.R.D. 75–7 (1975). After a trial herein the case was submitted for decision.

The issue concerns the proper tariff classification for certain merchandise imported from Switzerland in 1970, described on the commercial and special customs invoices as "Broxodent devices (electric toothbrushes)". These devices were classified by the regional commissioner of customs at the port of New York under the provision in item 750.40, TSUS, as modified by T.D. 68–9, for "Tooth brushes", and duty was assessed at the rate of 0.56 cent each plus 11.5 per centum ad valorem. Plaintiff claims that the merchandise is properly dutiable under the provision in item 688.40, TSUS, as modified by T.D. 68–9, for "Electrical articles, and electrical parts of articles, not specially provided for", at the rate of 8 per centum ad valorem, or alternatively under the provision in item 678.50, TSUS, as modified by T.D. 68–9, for "Machines not specially provided for, and parts thereof" at the rate of 7 per centum ad valorem.*

For the reasons indicated herein, I have concluded that the Broxodent devices were properly classified by the customs officials, and accordingly judgment will be entered for the defendant.

The Record

The following undisputed facts were set forth in my prior opinion (75 Cust. Ct. at 194):

> The imported article is a power unit for plaintiff's "Broxodent" electric toothbrush. Such power unit consists of a case containing an electric motor, an electric cord, a switch for turning the motor on and off, and a component designed to hold a brush. However, brushes were not included in the importation. The brush portion of the Broxodent electric toothbrush is not permanently affixed to the power unit, but rather is replaceable and interchangeable with other brushes designed to be affixed to the power unit. The brush component comprises approximately one percent of the value of the entire Broxodent electric toothbrush, and may be purchased at retail separately from the power unit.

At the trial, plaintiff introduced in evidence the oral testimony of three witnesses and nine exhibits, including a representative sample of the merchandise. The entry papers were received without specific marking. Additionally, the parties stipulated "that with respect to a unit comprised of one of the imported articles, and one brush, the cost of the brush represents approximately one percent of the cost of that complete unit to Squibb" (R. 11).

The record establishes the following additional facts:

Plaintiff sold the Broxodent electric toothbrush to the retail trade as either a "standard" or "deluxe" model. The "standard" model

*At trial, plaintiff abandoned an alternative claim under item 683.32, TSUS, and amended its complaint to include the alternative claim under item 678.50, TSUS (R. 3–4).

included: a Broxodent device, four brushes and a wall bracket; while the "deluxe" model included: the Broxodent device, six brushes, a wall bracket and a vinyl travel case. Replacement or refill brushes were sold separately for the Broxodent devices, but the latter were not sold separately except in instances where the warranty on a defective device had expired or the device had been abused by the user. Both the Broxodent device and a brush are essential components of plaintiff's electric toothbrush. The brushes used in conjunction with the the Broxodent device are interchangeable and are individually colored "so as to make them readily identifiable for use by individual members of the family" (R. 31). Finally, the Broxodent device has an electric motor which generates electricity to two steel bars attached to the sides of the motor, creating a magnetic action "for counterpoising magnets in the center of the unit" (R. 27). This magnetic action polarizes the two magnets.

OPINION

Defendant contends that the Broxodent devices are classifiable under item 750.40 by virtue of General Interpretative Rule 10(h), which reads as follows:

> (h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished.

Plaintiff, on the other hand, argues that the imports are not "unfinished" toothbrushes, but are merely parts of electric toothbrushes which, in the absence of any specific provision therefor in item 750.40, are properly dutiable under either item 688.40 or 678.50.

Since the *eo nomine* provision for toothbrushes in item 750.40 is plainly more specific than the basket provisions in items 688.40 and 678.50, the threshold issue posed is whether the Broxodent devices were properly classified as unfinished toothbrushes by virtue of Rule 10(h).

In my prior opinion, I discussed *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109 (1973), *aff'g* 68 Cust. Ct. 204, C.D. 4362, 343 F. Supp. 1372 (1972), wherein the application of Rule 10(h) to unassembled pieces of furniture was considered. There, unassembled pieces for wooden bunk beds, which did not include the side rails (regarded as essential parts of bunk beds), were held by a majority of the Court of Customs and Patent Appeals to be properly classified as *parts of furniture* under item 727.40, TSUS, as modified, rather than as *unfinished furniture* under item 727.35, TSUS, as modified, pursuant to Rule 10(h). Chief Judge Markey, writing for the majority of a divided court, agreed with the First Division of this court that the "substantially complete" test was the proper criterion for distinguishing between parts of an article and an unfinished article for purposes of Rule 10(h), and concluded that "the absence of a

substantial or essential part precludes classification as the unfinished article itself" (61 CCPA at 7).

Relying heavily upon *Authentic Furniture*, plaintiff contends that the absence of the brushheads (which are claimed to be essential parts of electric toothbrushes) precludes classification of the Broxodent devices as unfinished toothbrushes.

Although conceding that brushes are essential components of complete electric toothbrushes (but denominating them as "accessories"), defendant insists that *Authentic Furniture* is distinguishable from the present case. I agree.

In *Authentic Furniture*, the competing provisions were on the one hand "parts of furniture", and on the other hand "furniture" (unfinished by virtue of Rule 10(h)). In view of the specific provision for parts of furniture, the Customs Court and the Court of Customs and Patent Appeals were faced with the necessity of making a distinction between unassembled "parts" of furniture and "unfinished" furniture without effectively eliminating the specific parts provision.

Thus, Judge (now Chief Judge) Re, writing for the First Division of this court, pointed out that the specific tariff provision for parts of furniture under a superior heading covering "furniture and parts thereof"—

> * * * is an unequivocal and significant *reflection of legislative intent*. Consequently, to classify as furniture a substantially incomplete article consisting only of parts, *would render ineffectual the express provision for "parts of furniture"*. [Emphasis added. [68 Cust. Ct. at 210.]

Moreover, Judge Re opined (68 Cust. Ct. at 215):

> That parts of an article are classifiable as the article itself only if the article, as imported, is substantially complete, appears to be a reasonable application of General Interpretative Rule 10(h). *Any other construction of Rule 10(h) would have the effect of repealing a specific provision which expressly provides for a different rate of duty for parts than the article itself.* * * * [Emphasis added.]

Chief Judge Markey eschewed the "dedication to use" test applied in certain cases, noting that such test "makes no distinction whatsoever between the unfinished article and parts *thereof*" (61 CCPA at 7). [Emphasis added].

Significantly, it must be recognized there is no express provision in the tariff schedules for *parts of toothbrushes* which would be rendered ineffectual by classifying the imports as unfinished toothbrushes. Rather, the competition is between an *eo nomine* provision for toothbrushes (unfinished) and the basket provisions in items 688.40 and 678.50. Under these circumstances, I am persuaded that the rationale of *Authentic Furniture* is not dispositive here.

The short of the matter is that Rule 10(h) must be applied in light of the competing provisions and the merchandise involved. Since

there is no express tariff provision for parts of toothbrushes and, according to the stipulation of the parties, the brushheads comprise 1 percent of the cost of a complete unit, I am of the opinion that for purposes of Rule 10(h), the Broxodent devices are substantially complete toothbrushes. If on the other hand plaintiff's position were upheld, it would then logically follow that an electric toothbrush lacking merely *bristles* of negligible value could not be regarded as a substantially complete toothbrush because bristles are an essential part of a toothbrush. A dash of reality, of course, is useful. Hence, in view of Rule 10(h), it is inconceivable that Congress would have intended an incongruous result.

Congress has clearly manifested its intent that electric toothbrushes be classified under item 750.40, TSUS. See section 77 of Public Law 89–241, 79 Stat. 933 (the Tariff Schedules Technical Amendments Act of 1965, effective December 7, 1965); H. Rep. No. 342, 89th Cong., 1st Sess. (1965), p. 44; S. Rep. No. 530, 89th Cong., 1st Sess. (1965), p. 33; *Thalson Co.* v. *United States*, 64 Cust. Ct. 418, C.D. 4011 (1970). Moreover, Rule 10(h) is demonstrative of the congressional intent that incomplete articles may be classified under the provision covering the complete article. The Broxodent device, which requires only a cheap interchangeable brush to be a complete electric toothbrush, would seem to be a classic example of the type of merchandise for which Rule 10(h) was intended to be applied.

In support of its position, defendant cites *F. W. Myers & Co., Inc.* v. *United States*, 57 CCPA 87, C.A.D. 982, 425 F. 2d 781 (1970). In *Myers*, the question presented was whether the importations were properly classified by the customs officials as unfinished railroad tank cars by virtue of Rule 10(h) or were dutiable as containers, as claimed by plaintiff. In that connection, the Appellate Court stated (57 CCPA 91):

> * * * Viewing the merchandise as imported, it is our opinion that it constituted rolling stock with *the appearance and most of the apparatus* of a completed railroad tank car, sufficiently advanced toward completion as a railroad tank car that it was dedicated to that use and properly classified as an unfinished railroad tank car under item 690.15 by virtue of Interpretative Rule 10(h) TSUS. [Emphasis added.]

Looking at the representative sample, exhibit 4, I have no doubt that the Broxodent device possesses "*the appearance and most of the apparatus* of a completed * * * [electric toothbrush], sufficiently advanced toward completion as * * * [an electric toothbrush] that it was dedicated to that use * * *". [Emphasis added.] The motor, wiring, switch, plug and cord are all present in the device; only an interchangeable brush of nominal value is lacking to make a complete electric toothbrush.

For the reasons indicated, I conclude that the merchandise described on the invoices as "Broxodent devices (electric toothbrushes)" were properly classified by the regional commissioner of customs at the port of New York under item 750.40, TSUS, pursuant to Rule 10(h). Accordingly, plaintiff's action is dismissed and judgment will be entered for the defendant.

(C.D. 4706)

HENRY A. WESS, INC. *v.* UNITED STATES

Toys

An article described as a "Frisky Whiskey Bottle," and admittedly a "part" of a practical joke article, was classified under item 737.90 of the tariff schedules as a "part" of a toy, and assessed with duty at the rate of 35% ad valorem. Plaintiff's claims for classifications as machines not specially provided for (item 678.50), or as electric parts of articles not specially provided for (item 688.40), or as practical joke articles (item 737.65) dismissed.

PARTS–CLASSIFICATION

Although the item in issue was admittedly a part of a practical joke article, it could not be classified under the *eo nomine* provision for practical joke articles (737.65) since that provision does not provide for "parts" of practical joke articles. *See United States* v. *Lyons Transport*, 45 CCPA 104, C.A.D. 681 (1958); *Pacific Fast Mail* v. *United States*, 68 Cust. Ct. 41, C.D. 4333, 338 F. Supp. 506 (1972), *appeal dismissed*, 59 CCPA 223 (1972).

PARTS PROVISION–BASKET PROVISIONS

Under General Interpretative Rule 10(ij), a tariff provision will prevail over a "parts" provision, only if it is a specific provision which describes the merchandise. Plaintiff's alternative claims under items 678.50 and 688.40, which are for articles not specially provided for elsewhere in the schedules, are basket provisions, and therefore less specific than the provision for "parts" of toys under which classification was made. *See Ideal Toy Corporation* v. *United States*, 63 Cust. Ct. 406, C.D. 3926, *aff'd*, 58 CCPA 9, C.A.D. 996, 433 F. 2d 801 (1970).

TOYS–PLAYTHINGS

Under schedule 7, part 5, subpart E headnote, a toy is defined as "any article chiefly used for the amusement of children or adults." Plaintiff's contention that the item in issue was not a plaything, and that toys chiefly used for amusement are chiefly playthings, is without merit. An article need not be a "plaything" in order to be classified a "toy" under the tariff schedules. *See Ideal Toy Corporation* v. *United States, supra; United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, C.A.D. 1022, 440 F. 2d 1384 (1971). "If the purpose of an object is to give the same kind of enjoyment as playthings give, its purpose is amusement, whether the object is to be manually manipulated, used in a game, or * * * worn." *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA at 159.

Court No. 67/49679

Port of Cleveland

[Judgment for defendant.]

(Decided July 11, 1977)

Allerton deC. Tompkins for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *William F. Atkin*, trial attorney), for the defendant.

RE, Chief Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan. The customs invoices described the merchandise as "mechanical device whiskey bottle" and "battery operated mechanical device for bottles."

The merchandise was classified by the customs officials as "[t]oys, and parts of toys, not specially provided for: * * * Other," under item 737.90 of the Tariff Schedules of the United States [TSUS]. Consequently, it was assessed with duty at the rate of 35% ad valorem.

Plaintiff contests the classification and, hence, the rate of duty assessment. It is plaintiff's primary claim that the merchandise should have been properly and lawfully classified as "[m]achines not specially provided for, and parts thereof," under item 678.50 of the tariff schedules which provides for a duty rate of only 10% ad valorem. Alternatively, plaintiff claims classification of the imported merchandise as "[e]lectrical articles, and electrical parts of articles, not specially provided for," under item 688.40, with a duty rate of 11.5% ad valorem, or as "[m]agic tricks, and practical joke articles," under item 737.65, with a duty rate of 20% ad valorem.

The pertinent provisions of the tariff schedules may be set forth as follows:

Classified by the customs officials under:

Schedule 7, Part 5, "Subpart E.–Models; Dolls, Toys, Tricks, Party Favors

Subpart E headnotes:

* * * * * * *

2. For the purposes of the tariff schedules, a "toy" is any article chiefly used for the amusement of children or adults.

* * * * * * *

Toys, and parts of toys, not specially provided for:

* * * * * * *

737.90	Other	35% ad val."

Plaintiff's claimed classifications:

Schedule 6, Part 4, "Subpart H. – Other Machines

* * * * * * *

678.50 Machines not specially provided for, and parts thereof ..... 10% ad val."

Schedule 6, "Part 5. – Electrical Machinery and Equipment

* * * * * * *

688.40 Electrical articles, and electrical parts of articles, not specially provided for ..... 11.5% ad val.

* * * * * * *

[Schedule 7, Part 5, Subpart E]

737.65 Magic tricks, and practical joke articles .. 20% ad val."

It has been stipulated that the merchandise is a "part" of a practical joke article described as a "Frisky Whiskey Bottle." On the development of the concept of parts in customs law, see cases discussed in *Vilem B. Haan et al.* v. *United States*, 67 Cust. Ct. 104, 112–118, C.D. 4260, 332 F. Supp. 182, 186–191 (1971). The parties, however, are in serious disagreement whether the practical joke article, i.e., the Frisky Whiskey Bottle, is a toy within the meaning of the tariff laws.

Although the tariff laws specifically provide for "practical joke articles" in item 737.65 of the tariff schedules, that item does not provide for "parts" of practical joke articles. The customs officials, therefore, were confronted with the problem of classifying a part of a practical joke item when the provision for practical joke articles did not cover parts.

In the absence of a provision for "parts," the customs officials did not classify the merchandise, i.e., the part of the practical joke article, under the *eo nomine* provision for practical joke articles. They thereby adhered to the well-established principle of customs law that parts of an article are not included within an *eo nomine* designation of the article unless the tariff provision also expressly covers "parts" of the article. *See United States* v. *Lyons Transport*, 45 CCPA 104, C.A.D. 681 (1958); *Pacific Fast Mail* v. *United States*, 68 Cust. Ct. 41, C.D. 4333, 338 F. Supp. 506 (1972), *appeal dismissed*, 59 CCPA 223 (1972).

For customs classification purposes, parts of an article, and the article itself, are deemed to be separate and distinct articles. Hence, because of the absence of a parts provision, it cannot be contended that parts of practical joke articles are classifiable under the *eo nomine* provision for practical joke articles. Plaintiff's claim that the imported merchandise, concededly a part, is classifiable under item 737.65, which *eo nomine* covers the article, is therefore overruled.

Commencing with the premises that the merchandise is a constituent or component part of a practical joke article, and that

"practical joke articles" are provided for *eo nomine* in item 737.65, plaintiff has set forth its position in its brief as follows:

> "However, said Item 737.65 does not provide for 'parts' of practical joke articles, so plaintiff claims that the imported item should be classified either under the provision in TSUS 688.40 for 'electrical articles * * * not specially provided for' with duty at 11.5% ad valorem, or as 'machines not specially provided for' under TSUS 678.50 with duty at 10% ad valorem."

The classification problem presented is new only insofar as the merchandise consists of parts of practical joke articles. An analogous or comparable problem was dealt with in *Ideal Toy Corporation* v. *United States*, 63 Cust. Ct. 406, C.D. 3926 (1969), *aff'd*, 58 CCPA 9, C.A.D. 996, 433 F. 2d 801 (1970). In the *Ideal Toy* case, the merchandise consisted of miniature automobile chassis and bodies designed for use with a particular commercial line of model cars known as the Motorific line. Since the model kit provisions of the tariff schedules, i.e., items 737.05 through 737.09, did not provide for "parts" of models, the automobile chassis and bodies were classified by the customs officials as parts of toys under item 737.90, and were assessed with duty at 35% ad valorem. Plaintiff contested the classification and contended that the miniature car chassis and bodies should have been classified either as machines not specially provided for under item 678.50, dutiable at 10% ad valorem, or as electrical articles not specially provided for, under item 688.40 with duty at 11.5% ad valorem. This court, in an opinion by Judge Maletz, overruled the protests, and held that the automobile chassis and bodies had been correctly classified as parts of toys under item 737.90. The appellate court not only agreed with the conclusion of this court, but also adopted its reasoning and analysis of the legal problem presented. Indeed, the appellate court adopted this court's statement of the facts and quoted extensively from its opinion.

In the *Ideal Toy* case, the appellant-importer, before the appellate court, pursued the contention that had been previously advanced in this court, that the miniature automobile chassis and bodies were not dutiable as parts of toys under item 737.90 "inasmuch as those parts are specifically provided for elsewhere." The appellate court did not agree with that contention and quoted with approval the opinion of the Customs Court that "the intent of general headnote 10(ij) is that a provision for 'parts' is to be deemed more specific than a provision for 'articles, not specially provided for,' and therefore prevails" over general or "basket" provisions.

The appellate court proceeded to say:

> "The court [U.S. Customs Court] was of the view, and we think correctly so, that the provisions for articles not specially provided for of rubber or plastics (item 774.60); machines not specially provided for (item 678.50); and electrical articles not

> specially provided for (item 688.40) are all general descriptive provisions, i.e., basket clauses, which do not specifically describe one type of article." 58 CCPA at 13.

Among other things the court quoted the statement of the trial court that "[t]hey [the provisions urged by the appellant-importer] are scarcely the 'specific provisions' which would invoke the operation of general headnote 10(ij)."

Judge Almond, writing for the appellate court in the *Ideal Toy* case, concluded by stating: "[s]uffice it to say that we are not persuaded of error in the judgment rendered by the Customs Court" and, therefore, affirmed. A close reading of the appellate court opinion reveals that, in effect, it adopted the opinion of the Customs Court.

Much that is stated in both the trial and appellate courts' opinions in the *Ideal Toy* case is applicable to the discussion of the mechanical device that is a part of the whiskey bottle in the present case.

Quite naturally the defendant in this case approves, and indeed relies upon the legal approach by which the customs officials in the *Ideal Toy* case classified the miniature automobile chassis and bodies as parts of toys under item 737.90. In its main brief defendant submits that:

> "This Court's prior approval of this scheme as well as logic support this classification—since practical joke articles are toys, parts of practical joke articles are parts of toys and absent a specific provision for parts of practical joke articles, the next most specific classification would be that as 'parts of toys.'"

Defendant stresses the customs law principle that a provision for "articles not specially provided for" is less specific than a provision for "parts," and therefore a provision for "parts" prevails over a "basket" provision. *J. E. Bernard & Co., Inc.* v. *United States*, 62 Cust. Ct. 536, C.D. 3822, 299 F. Supp. 1129 (1969), *aff'd*, 58 CCPA 91, C.A.D. 1009, 436 F. 2d 506 (1971); *J. E. Bernard & Co., Inc.* v. *United States*, 59 Cust. Ct. 31, C.D. 3060 (1967).

Differently stated, the defendant relies upon the principle that, under General Interpretative Rule 10(ij), a tariff provision will prevail over a "parts" provision, only if it is a specific provision which describes the merchandise. Hence, the defendant emphasizes that since both of plaintiff's claimed classifications are not specific provisions, but are provisions for "articles not specially provided for," they cannot prevail over a "parts" provision. Specifically, the defendant concludes that since a "parts" provision, such as item 737.90, TSUS, will prevail over "basket" provisions, "such as the two classifications claimed," plaintiff has "failed to meet either of its burdens of proof and its claim must therefore fail."

It is significant that the competing provisions in the *Ideal Toy* case are identical to those in the present action, i.e., item 737.90 versus items 678.50 and 688.40. In view of the judicial rejection of the con-

tentions, now repeated in this case, it is clear that plaintiff's claimed classifications under items 678.50 and 688.40 must be rejected.

Plaintiff, nevertheless, vigorously disagrees and, in its main brief, asserts that "[u]nder the present tariff law a practical joke article is not a 'toy'; it can not be classified as a 'toy'. Therefore, a part of a practical joke article is not a 'part' of a 'toy'." It adds that "[t]his logical reasoning is inevitable." In its reply brief, it asserts that the *Ideal Toy* decision "does not support the claims advanced by defendant," and that it "has no relevancy whatsoever to the claims advanced by plaintiff in this case."

The court does not agree that the *Ideal Toy* case is irrelevant to the solution of the customs classification problem presented. Also, the court does not agree with the reasons or examples given by plaintiff, in its various briefs, designed to show that a practical joke article is not a toy.

Plaintiff takes issue with defendant's assertion that "[s]ince a practical joke article is chiefly used for the amusement of children or adults it is obviously a toy." Furthermore, plaintiff asserts that a practical joke article is not a "plaything," and that "toys chiefly used for amusement are basically playthings."

That "toys must be playthings" has not been the law subsequent to the enactment of the tariff schedules. *See S. Y. Rhee Importers* v. *United States*, 61 CCPA 2, C.A.D. 1108, 486 F. 2d 1385 (1973); *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, C.A.D. 1022, 440 F. 2d 1384 (1971).

The *Topps Chewing Gum* case illustrates clearly that an article need not be a plaything to be a toy under the tariff schedules. In *Topps*, the question presented was whether buttons with humorous sayings were properly classified as "toys" under item 737.90 of the tariff schedules. This court held that the buttons were not classifiable as "toys" since "to constitute a toy the article must be a plaything." *Topps Chewing Gum, Inc.* v. *United States*, 63 Cust. Ct. 431, 434, C.D. 3930 (1969). The Court of Customs and Patent Appeals reversed (C.A.D. 1022, *supra*), and expressly rejected the "plaything" argument now being urged anew in the present case.

Specifically referring to the holding of this court, that for tariff purposes a toy had to be a plaything, the appellate court in the *Topps* case wrote:

> "The court [Customs Court] reached this result through an unduly narrow construction of the term 'amusement.' After noting that prior to the enactment of the TSUS a 'toy' was defined as a child's plaything, the court cited *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967), for the proposition that the TSUS removed the limitation regarding the users' age but left the requirement that the object be a plaything. We think this conclusion is unsupported by the wording of the

> TSUS or by case authority. In the *Wilson's* case the court did not hold that to be a toy an object had to *be* a plaything * * *." (Emphasis in original.) 58 CCPA at 159.

Any remaining doubt is dispelled by the following statement in the *Rhee Importers* case:

> "We note further that three of appellant's four witnesses considered the articles to be toys or not to be toys upon the basis of whether they were or were not used as playthings—a factor considered irrelevant by this court upon enactment of the Tariff Schedules of the United States. *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, C.A.D. 1022, 440 F. 2d 1384 (1971)." 61 CCPA at 5.

In its surreply brief plaintiff modified its original argument that to be a toy an article had *to be* a plaything. It extracts a quotation from the *Topps* opinion and asserts that the provision for toys in item 737.90 "is limited to those articles of amusement which 'give the same kind of enjoyment *as playthings give*'." (Emphasis in original.) The quotation is taken from a portion of the *Topps* opinion wherein the court is distinguishing the case of *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967).

The language of the court in *Topps* follows:

> "In the *Wilson's* case the court did not hold that to be a toy an object had to *be* a plaything, but that the 'character of amusement involved was that derived from an item which is essentially a plaything.' *Id.* at 39. The court thus stressed the quality of mind or emotion induced by the object as controlling, and we think that is the best approach to interpreting the TSUS definition. If the purpose of an object is to give the same kind of enjoyment as playthings give, its purpose is amusement, whether the object is to be manually manipulated, used in a game, or, as here, worn." (Emphasis in original.) 58 CCPA at 159.

Surely plaintiff can find no support in this quotation for its apparent attempt to revive the pre-TSUS requirement that a toy had to be a plaything. In view of the TSUS expanded concept of toy, *Topps* teaches that "[i]f the purpose of an object is to give the same kind of enjoyment as playthings give, its purpose is amusement, whether the object is to be manually manipulated, used in a game, or, as here [the buttons in the *Topps* case], worn." Clearly the thrust of the explanation is that the article must have amusement as its purpose or *raison d'être*.

Plaintiff expresses the concern that unless its suggested meaning of "toys" is accepted, the item that covers "toys" will invade "tariff provisions for such things as cards, target rifles, cameras, television sets, firecrackers, race horses, golf, tennis and outdoor sports equipment, as well as *every* article of amusement in an 'amusement park'."

No argument, however vigorously asserted, can alter the fact that the governing statutory language provides that "[f]or the purposes of the tariff schedules, a *'toy'* is any article chiefly used for the amusement of children or adults." Plaintiff has not shown that the Frisky Whiskey Bottle, admittedly a practical joke article, is not an article chiefly used for the amusement of adults. In the absence of a showing to the contrary, the court may rely upon the presumption of correctness that the Frisky Whiskey Bottle is an article chiefly used for amusement, and therefore, for the purpose of classifying the imported parts, a toy within the meaning of the tariff schedules.

It cannot be disputed that in order to prevail plaintiff must bear the burden of proving that the customs classification is erroneous, and that its claimed classification is correct. 28 U.S.C. § 2635(a); *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA, 53, C.A.D. 1004, 435 F. 2d 1315 (1970). Plaintiff has failed to meet its burden of proof.

In view of the foregoing it is the determination of the court that the classification of the imported merchandise under the "parts of toys" provision of tariff item 737.90, as classified, prevails over the tariff items claimed by plaintiff.

Since it is the determination of the court that the merchandise has been properly classified, the classification is affirmed and the protest is overruled.

Judgment will issue accordingly.

(C.D. 4707)

CRABTREE VICKERS, INC. *v.* UNITED STATES

Plates, for printing

TSUS item 668.38 provides for plates, engraved or otherwise prepared for printing, in the exact terms of paragraph 341 of the 1922 and 1930 Tariff Acts. Under the 1922 and 1930 Tariff Acts, this court held that the term "plates * * * engraved or otherwise prepared for printing" includes only such as, in the condition imported, are ready for printing. *The Jersey City Printing Co. et al.* v. *United States*, 63 Treas. Dec. 397, T.D. 46219 (1933); *J. E. Bernard & Co., Inc.* v. *United States*, 6 Cust. Ct. 46, C.D. 422 (1941).

When a given tariff term has been judicially interpreted and is thereafter reenacted in substantially the same language, the rule is that the term, when used in a later statute, will be given the same interpretation unless a legislative intent to the contrary clearly appears. *W. E. Sellers* v. *The Cronite Co., Inc.*, 45 CCPA 27, C.A.D. 668 (1957); *August Bentkamp* v. *United States*, 40 CCPA 70, C.A.D. 500 (1952).

It is agreed that, in the condition imported, the merchandise consisting of aluminum plates coated with a photosensitive plastic cannot print anything; that before they can be used for printing the plates must be exposed to an image and the image developed.

HELD. The imported plates are not in the condition of the plates Congress intended to provide for under the TSUS item 668.38 provision, "plates * * * engraved or otherwise prepared for printing," as claimed by plaintiff.

Court No. 75-1-00278

Port of New York

[Plaintiff's motion for summary judgment denied; defendant's cross-motion granted.]

(Decided July 15, 1977)

Murray Sklaroff for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Susan Handler-Menahem*, trial attorney), for the defendant.

LANDIS, Judge: This action is brought to contest the classification of merchandise imported from England consisting of aluminum plates coated with a photosensitive plastic. Customs officials classified the plates as parts of printing machinery dutiable at 6 per centum ad valorem under item 668.50 of the Tariff Schedules of the United States (TSUS).[1]

Plaintiff claims that the plates are properly dutiable at only 5 per centum ad valorem under TSUS item 668.38, which provides as follows:

668.38	Steel plates, stereotype plates, electrotype plates, half-tone plates, photogravure plates, photo-engraved plates, and plates of other materials, engraved or otherwise prepared for printing	5% ad val.

Both sides assert that, material to the decision in this case, there is no genuine issue of fact. Pursuant to rule 8.2 of this court, both sides have moved for summary judgment. Plaintiff's motion seeks judgment sustaining the claim under TSUS item 668.38. Defendant's

[1] Schedule 6.—METALS AND METAL PRODUCTS
Part 4.—Machinery and Mechanical Equipment

*	* * * * * * *	*
	Printing machinery:	
* * *	Textile printing machinery	* * *
668.20	Other, including printing presses, offset duplicating machines, and stencil copy machines	6% ad val.
*	* * * * * * *	*
668.50	Other parts of printing machinery	The rate for the articles of which they are parts

motion requests judgment over-ruling plaintiff's claim and sustaining the customs classification upder TSUS item 668.50.

Factually,[2] it is agreed that the plates are parts of printing machinery [3] albeit in an unfinished condition;[4] that, in the condition imported the plates cannot print anything; that before they can be used for printing the plates must be exposed to an image and the image developed; and that the imported plates are none of the plates descriptively classified in item 668.38. The only issue in this case is whether the plates fall within the item 668.38 classifying provision for plates "of other materials, engraved or otherwise prepared for printing." If the plates are engraved or otherwise prepared for printing, specifically provided for under item 668.38, then they are not properly classifiable as parts of printing machinery, because a tariff provision for parts of an article does not prevail over a specific tariff provision for such part.[5]

Plaintiff contends that, while not engraved, the plates have been otherwise prepared for printing by coating with a photosensitive plate.[6] Citing, *Christo Poulos & Co., Inc., et al.* v. *United States*, 35 Cust. Ct. 69, C.D. 1724 (1955), plaintiff argues that the phrase "otherwise prepared," as frequently interpreted, is broad enough to cover the plastic coating process which, in this case, advanced the plates toward their ultimate use in printing.

Defendant, on the other hand, argues that, in the tariff sense, plates engraved or otherwise prepared for printing means plates which, if not engraved for printing, are, in the condition imported, comparable to a plate engraved for printing, that is, capable without further processing of producing an image by printing.

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[2] The plates in this case are described on the invoices as "Visiplates" and "Alympic Gold Plates." As pleaded by plaintiff (Complaint, paragraphs 6 and 7), defendent admits that:

6. As imported, each style of plate, regardless of description, is comprised of a base of aluminum which has been given an electrochemical grain, then anodized, then coated with a light sensitive photopolymer. The plates can only be used in conjunction with printing machinery, but must first be exposed to light and the image which it is desired to reproduce in print. After such exposure the plates are developed and can then be used for printing. The exposure and developing are carried out after importation.

7. The "Visiplates" yield a "negative" image after exposure and developing, that is, the portions of photopolymer reached by light are hardened. On developing, the softer areas, where light has been masked by the image, are washed away. The "Alympic Gold Plates" yield a "positive" image, after exposure and developing. The portions of photopolymer reached by light are softened, and are washed away in the developing.

[3] "10. General Interpretative Rules. For the purposes of these schedules—

* * * * * * *

(ij) a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." [TSUS, General Headnotes and Rules of Interpretation.]

[4] "10. General Interpretative Rules. * * *

* * * * * * *

(h) unless the context requires otherwide, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished." [TSUS, General Headnotes and Rules of Interpretation.]

[5] N. 3.

[6] Exhibits attached to the affidavit of Denis B. White, president of Howson-Algraphy, Inc., are stated to be representative and identical to the invoiced visiplates (exhibit 1) and alympic gold plates (exhibit 3), except as to length and width. Exhibits 1 and 3, after the exposure and developing described in n. 2, *supra*, are finished plates in the condition of exhibits 2 and 4, ready for use in printing.

I conclude that the words "engraved * * * for printing" connote a plate that requires no further processing for use in printing, and that the term "otherwise prepared" for printing logically also connotes a plate which, if not engraved, is in a prepared condition requiring no further processing for use in printing.

Plates, engraved for printing, have been specially provided for in tariff acts as far back as 1883. Under the 1913 Tariff Act, paragraph 137, provided for plates engraved for printing as follows:

> 137. Steel plates engraved, stereotype plates, electrotype plates, halftone plates, photogravure plates, photo-engraved plates, and plates of other materials, engraved for printing, plates of iron or steel engraved or fashioned for use in the production of designs, patterns, or impressions on glass in the process of manufacturing plate or other glass, 15 per centum ad valorem; lithographic plates of stone or other material engraved, drawn, or prepared * * * 25 per centum ad valorem.

The significant point of the above provision is that, in the qualified sense of plates for printing, the only plates Congress provided for were engraved plates. An engraved plate is a plate that has had pictures, lettering, etc. cut into the plate for the purpose of printing. No further processing is necessary to print from plates made by such a process.[7] The 1913 Tariff Act did not provide for plates "otherwise prepared for printing." In the 1922 Tariff Act, paragraph 341,[8] Congress amended the provision for plates for printing to include such as were "engraved or otherwise prepared for printing." The amendment was apparently prompted by what was reported to the Senate Committee on Finance in the *Summary of Tariff Information*, 1921, as follows, at page 448:

> "Suggested Changes.—The plates named in this paragraph are not strictly engraved plates. The words 'or otherwise prepared' might be inserted * * * after 'engraved.' "

TSUS item 668.38 provides for plates engraved or otherwise prepared for printing in the exact terms of paragraph 341 of the 1922 and 1930 Tariff Acts. The master rule in the consideration of statutes is to ascertain and carry out the legislative intent using, if necessary, established rules of construction. *Sears, Roebuck & Co.* v. *United States*, 26 CCPA 161, 167, C.A.D. 11 (1938). It is clear, under the 1913 Tariff Act, that Congress limited the classification of plates for printing to those engraved for printing and that engraved plates for printing require no further processing for printing. It is not at all clear what Congress intended when it inserted the words "otherwise

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[7] *Funk & Wagnalls Standard Dictionary, International Edition* (1963) defines the term "engrave" as follows:

engrave v.t. *.graved, .graving* 1 To carve or etch figures, letters, etc., into (a surface). 2 To impress deeply. 3 To cut (pictures, lettering, etc.) into metal, stone, or wood, for printing. 4 To print from plates made by such a process. * * *

[8] Paragraph 341 of the 1930 Tariff Act is the same as paragraph 341 of the 1922 Tariff Act.

prepared" after the word "engraved" in the 1922 and subsequent tariff acts. The whole point of plaintiff's argument is that in the condition imported the plates are "otherwise prepared," because they have been advanced toward their ultimate use in printing by coating with a photosensitive plastic. *Christo Poulos*, relied on by plaintiff, does support the rule that the word "prepared," in a tariff sense, ordinarily means that a commodity has been processed in a manner that advances and makes it more valuable for its intended use. The merchandise in *Christo Poulos*, however, was ginger root in brine classified under a provision (paragraph 778) of the 1930 Tariff Act for "Ginger root, candied, or otherwise prepared or preserved." That provision unqualifiedly covered ginger root, candied or otherwise prepared or preserved. Item 668.38 does not unqualifiedly cover all plates "engraved or otherwise prepared." It only covers such plates as have been "engraved or otherwise prepared for printing." The distinction is a material one, and plaintiff's resort to the rule of construction subscribed to in *Christo Poulos* does not persuade me that it is the best of all rules to apply in seeking to ascertain what Congress intended when it classified plates "engraved or otherwise prepared for printing."

The tariff history of the terms used suggests application of more definitive rules.

Plaintiff allows that there is a paucity of case law involving the tariff provision for plates engraved or otherwise prepared for printing. That may be so, but independent research turns up at least two cases which hold that plates, engraved or otherwise prepared for printing, include only such as in the condition imported are ready for printing, that is, require no further processing. *The Jersey City Printing Co. et al.* v. *United States*, 63 Treas. Dec. 397, T.D. 46219 (1933); *J. E. Bernard & Co., Inc.* v. *United States*, 6 Cust. Ct. 46, C.D. 422 (1941). The plates in *Jersey City* consisted of a steel sheet with a flash or very thin finish of copper on top of it and on top of the copper a layer of chromium not more than one ten-thousandths of an inch in thickness. After importation a developing silver solution was applied to the chromium surface; the whole surface was then subjected to a photographic process, after which an applied etch ate out all space not affected by light, leaving a printing surface slightly raised. This court, commenting that the entire process was still in an experimental state, held that "the merchandise in its imported condition did not consist of 'steel plates * * * engraved or otherwise prepared for printing' within the meaning of paragraph 341 of the act of 1922." In *J. E. Bernard & Co., Inc.* (an opinion decision written by Judge Dallinger, who had written the opinion decision in the *Jersey City* case), merchandise invoiced as "45 litho zinc plates with original work for reproduction of maps" was held properly dutiable as claimed under paragraph 341 of the 1930 Tariff Act under the provision "steel

plates * * * and plates of other materials, engraved or otherwise prepared for printing," or alternatively under the same paragraph as "lithographic plates of stone or other material engraved, drawn, or prepared." Replying to the defendant's citation of the *Jersey City* case in support of the contention that the plates were not prepared for printing within the meaning of the relevant tariff provision, this court stated:

> * * * We have carefully read the decision in that case [*Jersey City*] and regard it as having no application to the facts in this case. There, the merchandise consisted of certain chromium, steel, and copper plates to which certain processes had been applied after importation to render them prepared for printing. Here, no additional processes are required to be applied to the imported plates to make them ready for use in offset printing. [6 Cust. Ct. at 49.]

Jersey City and *J. E. Bernard* taken together clearly spell out this court's interpretation of the term "engraved or otherwise prepared for printing" in the 1922 and 1930 Tariff Acts. Congress first used the term in the 1922 Act, carried it over into the 1930 Act and again carried it over into TSUS item 668.38. When a given tariff term has been judicially interpreted and is thereafter reenacted in substantially the same language, the rule is that the term, when used in a later statute, will be given the same interpretation unless a legislative intent to the contrary clearly appears. *W. E. Sellers* v. *The Cronite Co., Inc.*, 45 CCPA 27, C.A.D. 668 (1957). Absent any showing of a legislative intent to the contrary, I am brought to apply the doctrine of legislative ratification of judicial construction to item 668.38 in this case. *August Bentkamp* v. *United States*, 40 CCPA 70, C.A.D. 500 (1952).[9] The case of *Volkswagen of America, Inc.* v. *United States*, 68 Cust. Ct. 122, C.D. 4348, 340 F. Supp. 983 (1972); *aff'd*, *United States* v. *Volkswagen of America, Inc.*, 61 CCPA 41, C.A.D. 1115, 494 F. 2d 703 (1974), cited and referred to by plaintiff in its brief, is not applicable as that case was one in which the court discussed the inadvisability of determining legislative intent in a prior act by the use of supplemental reports not involved in the enacting of legislation and considerably later in point of time. In ascertaining legislative intent, it is also a rule of statutory construction that a general term, such as "otherwise prepared," following a specific enumeration, such as here, "engraved," is to be construed as *ejusdem generis* with the specific enumeration. The words "for printing" following the general term add an even more positive dimension to the rule. As the court of appeals has said:

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[9] See, *Summaries of Trade and Tariff Information*, Schedule 6, Volume 8 (1969), prepared in terms of TSUS, where in discussion of the commodity "printing plates," item 668.38, it is stated, at page 267, that:

> * * * Unfinished plates or plates that have been finished but have not been engraved or otherwise prepared for printing are not covered by this summary [on printing plates] * * *.

> The rule of *ejusdem generis* (where particular words of description are followed by general terms, the latter refer only to things of a like class with those particularly described) is a well known rule of construction, often used by this court, to aid in arriving at the legislative intent of Congress, which, of course, is the ultimate consideration in the construction of tariff statutes. The rule is primarily designed to preserve the meaning of the particular words as well as to give to the general words an interpretation consistent with the manifest purpose of the entire act. *Overton & Co.* v. *United States*, 2 Ct. Cust. Appls. 422, T.D. 32172. The latter purpose subserves an even more fundamental purpose of giving effect, if possible, to *all* words in a statutory provision, since the legislature is not presumed to have used superfluous words. [Citing authorities.] [*United States* v. *C. J. Tower & Sons*, 44 CCPA 1, C.A.D. 626, at 5.]

Concededly, the plates in the condition imported in this case cannot be used for printing and require further processing. The imported plates are not, therefore, in the condition of the plates Congress intended to provide for under the item 668.38 provision, "plates * * * engraved or otherwise prepared for printing."

Plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted. The action is accordingly dismissed.

Judgment will so enter.

(C.D. 4708)

SUWANNEE STEAMSHIP COMPANY *v.* UNITED STATES

Remission of duties—
Ship repairs

1. *Administrative Law:* There is a strong presumption in favor of judicial review of administrative action. Nonreviewability is an exception which must be affirmatively demonstrated.
2. *Administrative Law:* Administrative action based upon discretionary authority is subject to judicial review unless Congress manifests an intent to preclude review, or judicial standards for measuring the reasonableness of the administrative action are totally absent.
3. *Administrative Law:* Judicial review of administrative action based upon the exercise of discretionary authority is available to assure that the administrative action is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
4. *Administrative Law:* In cases of express delegation of discretionary authority, where the administrative action is not contrary to law and has a rational basis, the courts will not substitute their discretion for that of the administrator.
5. *Administrative Law:* Where no formal record of the administrative proceeding is made, the agency determination must

be accompanied by an explanation of its action sufficient to enable the reviewing court to determine whether the action was reasonable.

6. *Administrative Law:* Courts will uphold the interpretation of a statute by the agency charged with its administration where the interpretation is not inconsistent with the statutory language or the congressional intent.
7. *Administrative Law:* Where administrative action is based upon the exercise of discretion in light of an accumulated administrative experience, the scope of judicial review is more circumscribed than in the performance of the judicial function of the interpretation and application of the statutory mandate.
8. *Administrative Law:* The administrative decision, based upon an exercise of discretionary authority, must stand unless it was made without a rational explanation, inexplicably departed from established policies, rested on an impermissible basis such as invidious discrimination, or on other considerations that Congress could not have intended to make relevant.
9. *Customs:* The Secretary of the Treasury's interpretation of section 466 of the Tariff Act of 1930, 19 U.S.C. § 258(1) as precluding remission of duties unless the cause of the damage and the repairs occur during the same voyage, is fully consistent with the statutory language and properly effectuates the congressional intent of providing maximum protection to American shipyards.
10. *Customs:* As used in section 466, 19 U.S.C. § 258(1), the phrase "or other casualty" is to be considered together with the statutory phrase "stress of weather," broadening the term to include other similar casualties. A casualty similar to "stress of weather" would include one that is violently exerted; that which comes with unexpected force or violence, such as that of a fire, a collision, or an explosion.
11. *Customs:* The salting of the vessel's boilers was due to the negligence of the vessel's chief engineer, in that he failed to flush salt water out of the fresh water tanks while in port, as instructed, and not to an event occurring "with the violence of the turbulent forces of nature," was not a "casualty" within the meaning of section 466, 19 U.S.C. § 258(1).

Court No. 70/2603

Port of Tampa

[Judgment for defendant.]

(Decided July 18, 1977)

Toole, Taylor, Moseley & Milton (*James F. Moseley* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Edmund F. Schmidt*, trial attorney), for the defendant.

RE, Chief Judge: Plaintiff steamship company brought this action to recover customs duties paid on certain repairs made in

foreign ports to the "S.S. Volusia." It maintains that the duties should have been remitted by the Secretary of the Treasury because the foreign repairs were the result of a casualty.

Contending that there is no genuine issue of fact which requires a trial, the defendant has moved for summary judgment pursuant to Rule 8.2 of the rules of this court. Since plaintiff did not controvert the facts stated in the defendant's motion for summary judgment, those facts are deemed admitted under Rule 8.2(b). *See Mobilite, Inc.* v. *United States*, 70 Cust. Ct. 359, C.R.D. 73–11 (1973).

In 1968, the plaintiff was the operator of the "S.S. Volusia." In January and March of that year, on a voyage from Morocco to Norfolk, Virginia, the Volusia encountered heavy seas, requiring the use of salt water for ballast in the vessel's fresh water tanks. While in Norfolk, the failure of the vessel's chief engineer to flush the salt water from the tanks, as he had been instructed, caused the contamination of the fresh water taken on board while the vessel was in port. On the vessel's subsequent voyage, from Norfolk to South Africa, this contaminated water salted both boilers and necessitated repairs. The repairs were made in Port of Spain, Trinidad in April 1968, and in Capetown, South Africa in June 1968.

Pursuant to the provisions of section 466 of the Tariff Act of 1930, 19 U.S.C. § 257, duties of 50 per centum ad valorem were assessed on the cost of these foreign repairs. Plaintiff sought remission of these duties under section 466 of the Tariff Act of 1930, 19 U.S.C. § 258, from the regional commissioner of customs in Miami, Florida. The application for remission was denied on the ground that the ultimate cause of the repairs, i.e., the taking on of salt water and, the failure to flush the tanks while in port, did not occur on the same voyage as the repairs. Plaintiff paid the assessed duties, and thereafter brought this action for their recovery.

The relevant statutory provisions are sections 257 and 258 of Title 19 of the United States Code, as written prior to January 5, 1971.[1] Duties on the Volusia's repairs were assessed pursuant to section 257, which provides in pertinent part:

> "§ 257. Duty on equipments or repair parts for vessels.
>
> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; * * *."

[1] P.L. 91-654, 84 Stat. 1944, substantially amended these two sections effective January 5, 1971. The amended statute is now codified at 19 U.S.C. § 1466.

The plaintiff's application for remission of the duties paid was made under section 258, providing in pertinent part:

"§ 258. Remission for necessary repairs.

If the owner or master of such vessel furnishes good and sufficient evidence—

(1) That such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination; * * *

* * * * * * *

then the Secretary of the Treasury is authorized to remit or refund such duties, * * *."

The defendant previously moved to dismiss this action asserting that the court lacked jurisdiction. It contended that the statutory authority conferred upon the Secretary of the Treasury to remit repair duties was entirely discretionary, and that the exercise of that discretion was final and not subject to judicial review. In part, the contention was based upon section 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), which provides:

"Chapter 7 – Judicial Review

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

* * * * * * *

(2) agency action is committed to agency discretion by law."

This court held that the contention was without merit. *Suwannee Steamship Company* v. *United States*, 70 Cust. Ct. 327, C.R.D. 73–3, 354 F. Supp. 1361 (1973). Clearly, defendant overlooked the strong presumption in favor of judicial review of administrative action. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S. Ct. 1507 (1967). *Cf. Califano* v. *Sanders*, 430 U.S. 99, 97 S. Ct. 980 (1977). The Supreme Court has left no doubt that "[i]ndeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated." *Barlow* v. *Collins*, 397 U.S. 159, 166, 90 S. Ct. 832, 838 (1970). *See also Dunlop* v. *Bachowski*, 421 U.S. 560, 95 S. Ct. 1851 (1975); K. Davis, *Administrative Law of the Seventies* §§ 28.16–28.16–1 at pp. 638–41 (1976) and Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968).

Furthermore, since statutes are to be read *pari materia*, the defendant's assertion, that the Secretary's exercise of discretion was

judicially unreviewable, ignored the mandate of section 706(2)(A) of the A.P.A., 5 U.S.C. § 706(2)(A), which provides:

> "§ 706. Scope of Review.
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * * * * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law; * * *." (Emphasis added.)

If all agency action dependent upon the exercise of delegated discretionary authority were immune from judicial review, section 706(2)(A) of the A.P.A. would be useless and meaningless.

In the effort to give effect to both provisions of the A.P.A., an increasing number of federal courts have granted a limited scope of judicial review to assure that administrators act reasonably, and do not abuse the discretion delegated by the Congress. *See, e.g., Krueger* v. *Morton*, 539 F. 2d 235 (D.C. Cir. 1976); *Ortego* v. *Weinberger*, 516 F. 2d 1005 (5th Cir. 1975); *Reece* v. *United States*, 455 F. 2d 240 (9th Cir. 1972); *Littell* v. *Morton*, 445 F. 2d 1207 (4th Cir. 1971); *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (2d Cir. 1966). These courts have determined that—

> "the reviewing court * * * has the power to ensure that the [administrative decision] is not wholly dependent upon the personal will of the administrator." B. Schwartz, *Administrative Law* § 216 at p. 608 (1976).

This court denied the defendant's prior motion to dismiss and held that the Secretary's discretionary authority to remit the foreign repair duties was judicially reviewable, and was bounded by the court's power to prevent action which was arbitrary, capricious or an abuse of discretion. *Suwannee Steamship Company* v. *United States*, 70 Cust. Ct. 327, C.R.D. 73-3, 354 F. Supp. 1361 (1973). That decision, therefore, held that judicial review was *available*. The present motion for summary judgment presents the question of the *scope* of that review.

Under section 706 of the A.P.A., which sets forth the scope of judicial review, the reviewing court is required to "hold unlawful and set aside agency action, findings, and conclusions found to be— * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In cases of express delegation of discretionary authority, the courts have held the scope of judical review to be limited and narrow. Under this standard of review, it has been held that if the administrative

decision is not contrary to law, and has a rational basis in fact, the courts will not substitute their discretion for that of the administrator. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S. Ct. 438 (1974); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971).

In situations in which the agency action is not based upon a formal record of the administrative proceedings, the reviewing court must be presented with an explanation of the reasons given by the administrator for his decision.[2] *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*; *Camp* v. *Pitts*, 411 U.S. 138, 93 S.Ct. 1241 (1973); *DeVito* v. *Shultz*, 300 F. Supp. 381 (D.D.C. 1969). In cases where the administrator's stated explanation is sufficient to enable the court to determine the reasonableness of his actions, only those reasons need be considered, and the court will not speculate on potentially reasonable alternative justifications which were not raised.[3] *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*; *Camp* v. *Pitts*, *supra*.

The Secretary of the Treasury's explanation for his refusal to remit the repair duties to the plaintiff was contained in a letter from the deputy assistant regional commissioner of customs in Miami. This letter to the plaintiff, dated December 16, 1969, gave the following explanation for the action of the customs officials:

> "There is no authority for remission unless the repairs and stress of weather or casualty that led to the repairs take place during the same voyage. Since the VOLUSIA encountered heavy weather on a voyage prior to the one in which the repairs were effected, your petition therefore is denied."

Bearing in mind the judicially determined scope of review, this explanation for the administrative action may be said to raise two main questions.

The first is whether the Secretary of the Treasury's interpretation of section 466 of the Tariff Act of 1930, 19 U.S.C. § 258(1), that remission was precluded unless the cause of the damage occurred during the same voyage as the repairs, was "not in accordance with law."

The second is whether the Secretary's finding, that the cause of the damage necessitating the repairs occurred prior to the voyage when they were made, was reasonable, that is, neither "arbitrary, capricious, [nor] an abuse of discretion."

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[2] In cases where a formal administrative record of a public adjudicatory proceeding is available, the administrator's decision must be supported by substantial evidence on the record viewed as a whole under section 706(2)(E) of the A.P.A., 5 U.S.C. § 706(2)(E). *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*; *Citizens to Preserve Overton Park* v. *Volpe*, *supra*.

[3] If the administrative explanation is insufficient to judge the reasonableness of the agency action, the matter is remanded to the administrator for a fuller and more precise statement. *See Camp* v. *Pitts*, *supra*; *DeVito* v. *Shultz*, *supra*.

The first question is one of statutory interpretation and application. In administrative law, the courts have shown great deference to the interpretation given to a statute by the agency or official charged with its administration. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 85 S. Ct. 792 (1965); *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851 (1944); and authorities cited in *John V. Carr & Son, Inc.* v. *United States*, 69 Cust. Ct. 78, C.D. 4377, 347 F. Supp. 1390 (1972). Nevertheless, the courts will not defer to an administrative interpretation of a statute when it is inconsistent with the statutory language or the congressional purpose and intent. *See Morton* v. *Ruiz*, 415 U.S. 199, 94 S. Ct. 1055 (1974); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 S.Ct. 334 (1973); *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 89 S.Ct. 1794 (1969). *See also* materials on "Application of Statutory Terms to Facts and Interpretation of Statutory Terms" in Gellhorn and Byse, *Administration Law* 427 *et seq.* (6th ed. 1974).

A careful reading of the statute, and an examination of the legislative history of section 466, 19 U.S.C. § 258(1), amply demonstrate that the Secretary's interpretation is consistent with the legislative policy. Section 466 of the Tariff Act of 1922 contained a provision for remission of foreign repair duties identical with the one before the court. When the Tariff Act of 1930 was being enacted, the House of Representatives passed an amended version of section 466 which would have substantially increased the number of situations in which remission was permissible. Under the House revision, the Secretary was authorized to remit duties upon evidence—

> "(1) That such equipment or parts thereof or repair parts or materials were purchased, or that such expenses of repairs were incurred, in a foreign country, in order to maintain such vessel in a seaworthy condition, or to repair damages suffered or to replace equipment damaged or worn out during the voyage, or to maintain such vessel in a sanitary and proper condition for the carriage of cargo or passengers; * * *." H.R. 2667, § 466 at p. 327 (passed House, May 28, 1929).

The rationale for this revision of section 466 was stated succinctly in the Report of the House Committee on Ways and Means:

> "Your committee believes that the limitations of this section [section 466 of the Tariff Act of 1922] are too strict and result in an unnecessary burden on American shipping.
>
> The section as construed does not permit the remission for refunding of duties in the case of equipment purchased or repairs made in the ordinary course of the voyage to replace worn-out equipment or to repair minor damages or ordinary wear and tear." H. Rep. No. 7, 71st Cong., 1st Sess. 171 (1929).

Clearly, the House amendment would have greatly increased the situations in which duties were to be remitted. Under the amendment,

only a general overhaul or reconditioning would have been excluded from the remission allowance. *See id.*

The members of the Senate Finance Committee rejected this House amendment, and, in the bill reported to the full Senate, substituted the wording that presently appears in section 466.

Both the hearings of the Senate Committee, and the committee's final report on section 466, evidence the concern of the committee members that the House amendment would have provided insufficient protection for American shipyards, the class for whose benefit the section was originally formulated. *See Senate Hearings* on H.R. 2667, 71st Cong., 1st Sess., Vol. XVII at 537–46 (1929) [hereinafter cited as *Hearings*]; S. Rep. No. 37, 71st Cong., 1st Sess. 72 (1929).

In furthering this goal of protecting American shipyards, the Senate version of section 466 did two things. First, it limited remission to relatively serious repairs: those necessary "to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination." And second, it strictly defined both the nature and the timing of the cause of the damage necessitating the repairs. This was accomplished by authorizing remission only for those repairs caused "by stress of weather or other casualty," provided that the stress of weather or other casualty occurred while the vessel was "in the regular course of her voyage."

The Secretary's interpretation of section 466 effectuates these statutory objectives. The plaintiff's assertion, that this interpretation of the authority to remit frustrates congressional intent by unfairly penalizing shipowners, was answered by several members of the Senate Committee. The Secretary's interpretation was seen as giving maximum protection to American shipyards, while at the same time costing American shipowners no more for foreign repairs than they would pay at home due to lower labor and equipment costs in foreign ports. *See Hearings, supra* at 539–40 (remarks of Senator Couzens); *id.* at 544 (remarks of Senator Sackett). The committee report indicates that the Senate version of section 466 still provided "generous" treatment to American shipowners, because the repair duty merely equalized the cost of foreign and domestic repairs. *See* S. Rep. No. 37, 71st Cong., 1st Sess. at 72 (1929).

In light of the legislative history, which shows a congressional intent to formulate a narrow and strict remission provision to protect American shipyards, the court concludes that the Secretary's interpretation of section 466, 19 U.S.C. § 258(1), is in furtherance of the legislative purpose, and therefore "in accordance with law."

The second question presented is whether the Secretary's finding, that the cause of the damage necessitating the repairs occurred on a prior voyage, is a reasonable one which ought not to be judicially disturbed. This inquiry deals with a review of the exercise of administrative discretion based upon an evaluation of all the salient facts,

including administrative experience. The scope of judicial review of this expressly delegated administrative discretion is more restricted and circumscribed than in the performance of the judicial function in the interpretation and application of the statutory mandate. *See Barlow* v. *Collins*, 397 U.S. 159, 166 90 S.Ct. 832, 837, (1970); *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268–70, 80 S.Ct. 1122, 1126–27 (1960). *See also Gray* v. *Powell*, 314 U.S. 402, 411, 62 S. Ct. 326, 332 (1941).

Indeed, respected judicial authority teaches that the administrator's decision must stand unless the reviewing court finds that it was—

> "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or in Judge Learned Hand's words, on other 'considerations that Congress could not have intended to make relevant.'" *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F. 2d 715, 719 (2d Cir. 1966).

No such finding can be made in this case. On the contrary, at least two specific reasons have been stated to sustain the Secretary's determination.

First, the Secretary determined that the ultimate cause for the salting of the vessel's boilers was the taking on of salt water for ballast during the prior voyage from Morocco to Norfolk. This was coupled with the failure of the vessel's chief engineer to flush the salt water from the tanks in Norfolk, as instructed. In its complaint, and by its failure to file an opposing statement, the plaintiff has admitted these facts or events. In concluding that the taking on of salt water, and the subsequent failure to flush it out before adding fresh water, ultimately caused the damage, the Secretary acted well within his discretionary authority under section 466, 19 U.S.C. § 258(1). Since plaintiff has offered no other cause or explanation, one cannot quarrel with the reasonableness of the Secretary's finding. Hence, since both of these events occurred prior to the voyage from Norfolk to South Africa, when the repairs were made, the Secretary acted reasonably in refusing to remit the repair duties.

Second, the Secretary had a reasonable basis for concluding that, within the meaning of section 466, 19 U.S.C. § 258(1), no "casualty," occurred on the vessel's voyage from Norfolk to South Africa. In *Dollar Steamship Lines, Inc.* v. *United States*, 5 Cust. Ct. 23, 28–29, C.D. 362 (1940), this court indicated that—

> "the word 'casualty' is to be considered together with the phrase 'stress of weather.' The phrase 'or other casualty' is supplemental to and qualifies the phrase 'stress of weather' broadening the term to include other similar casualties. * * * A casualty similar to 'stress of weather' would include such as is violently exerted; that which comes with unexpected force or violence, such as that of a fire, or a collision, or an explosion.

> We are of the opinion that a casualty similar to 'stress of weather' should be of necessity a happening that comes with the violence of the turbulent forces of nature."

In *International Navigation Co., Inc.* v. *United States*, 38 Cust. Ct. 5, 11, C.D. 1836, 148 F. Supp. 448 (1957), after reaffirming the analysis of the term "casualty" in the *Dollar Steamship* case, this court explained further:

> "It is evident that under the provision as enacted it was not intended that duties should be remitted in all cases where repairs were made because of damages suffered or equipment damaged or worn out during the course of a voyage, even though such repairs were necessary to maintain the vessel in a seaworthy condition. It was only where the damage occurred by reason of some serious or extraordinary event, described as 'stress of weather or other casualty,' that remission was permitted."

The evidence presented to the Secretary failed to establish that the salting of the vessel's boilers occurred "with the violence of the turbulent forces of nature," or from any analogous circumstance. Rather, it is plain that the damage was directly attributable to the negligence of the vessel's chief engineer in failing to flush the fresh water tanks in Norfolk. It was reasonable for the Secretary to conclude that this negligence did not justify remission under the statute.

In view of the foregoing, it is the determination of this court that the Secretary of the Treasury acted reasonably, and did not abuse his discretion by refusing to remit the duties paid on the foreign repairs to the S.S. Volusia. Since the administrative action under review was not shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the defendant's motion for summary judgment is granted.

Judgment will be entered accordingly.

(C.D. 4709)

STELLA D'ORO BISCUIT CO., INC. *v.* UNITED STATES

Bakery oven

INDUSTRIAL OVENS (ITEM 661.30, TSUS)—BAKERY OVEN

> Bakery oven was properly classified by the customs officials under the provision in item 661.30, TSUS, for industrial ovens, non-electric, and parts thereof, rather than under the provision in item 666.25, TSUS, for industrial machinery for preparing and manufacturing food or drink and parts thereof, claimed by plaintiff.

SAME—BRUSSELS NOMENCLATURE

> Bakery ovens are encompassed within the provision in item 661.30, TSUS, for industrial ovens, non-electric. *Explanatory Notes to the Brussels Nomenclature* (1955), Vol. III, Heading

84.14 (p. 791). In view of the identical phraseology in both Brussels heading 84.14 and TSUS item 661.30, the *Explanatory Notes* are a significant source of legislative history and of interpretation respecting item 661.30. *Mattel, Inc.* v. *United States*, 65 Cust. Ct. 616, 625–26, C.D. 4147 (1970).

CLASSIFICATION FOR INDUSTRIAL MACHINERY FOR PREPARING AND MANUFACTURING FOOD DETERMINED BY CHIEF USE—GENERAL INTERPRETATIVE RULE 10(e)

The tariff classification in item 666.25, TSUS, covering industrial machinery for preparing and manufacturing food or drink and parts thereof is controlled by use (other than actual use), and therefore is to be determined in accordance with the chief use in the United States of the class or kind of merchandise to which the imported article belongs at, or immediately prior to, the date of importation. General Interpretative Rule 10(e).

GENERAL INTERPRETATIVE RULE 10(c)—HEADNOTE 1, PART 4A, SCHEDULE 6

Since a bakery oven falls within the purview of both items 661.30 and 666.25, General Interpretative Rule 10(c) and headnote 1, part 4A, schedule 6 are applicable, and negate classification of the oven under item 666.25.

RELATIVE SPECIFICITY—ITEM 661.30 vs. ITEM 666.25

As between item 661.30, TSUS, and item 666.25, TSUS, the provision which more specifically describes the oven herein is "the item having requirements which are 'more difficult to satisfy'." *F. L. Smidth & Company* v. *United States*, 56 CCPA 77, 85, C.A.D. 958, 409 F. 2d 1369 (1969), cited. The provision in item 661.30, for industrial ovens, non-electric, is more restrictive and difficult to satisfy than the provision in item 666.25 for industrial machinery for preparing and manufacturing food or drink, which describes virtually every conceivable piece of machinery used industrially for preparing and manufacturing food or drink, including bakery ovens. Accordingly, item 661.30 more specifically describes the imported oven.

HEADNOTE 1, PART 4A, SCHEDULE 6

Item 661.30, TSUS, under which the oven was classified, appears in part 4A, schedule 6, while item 666.25, TSUS, claimed applicable by plaintiff, is found in part 4C, schedule 6. As between the two competing provisions, Congress has clearly manifested its intent in headnote 1, part 4A, schedule 6 that industrial ovens (i.e., bakery ovens) be classified in subpart A.

ENTIRETIES DOCTRINE—BREADSTICK PRODUCTION LINE

Fundamentally, if a *complete* breadstick production line were classifiable as an entirety, the oven component alone could not be subject to separate classification. *Trans-World Shipping Service, Inc., et al.* v. *United States*, 58 Cust. Ct. 120, 124, C.D. 2900 (1967), cited.

SAME

The testimony of plaintiff's witnesses establishes that a complete breadstick production line includes a wrapping or packaging machine, which was not included in the entry covering the oven.

Since the entry did not include a complete breadstick production line, the invoiced equipment (which included the oven) could not properly be classified as an entirety under item 666.25, TSUS. *Cf. United States* v. *Baldt Anchor*, 59 CCPA 122, C.D. 1051, 459 F. 2d 1403 (1972).

Court No. 75-1-00145

Port of New York

[Judgment for defendant.]

(Decided July 22, 1977)

Goldrich & Gross (*Robert A. Calinoff* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim* trial attorney), for the defendant.

NEWMAN, Judge: Plaintiff imported an oven and various other pieces of bakery equipment from Italy, which were entered at the port of New York in August 1973. With the exception of the oven, the equipment covered by the entry was assessed with duty upon liquidation at the rate of 5.5 per centum ad valorem pursuant to the provision in item 666.25, TSUS, as modified by T.D. 68-9, for "Other" industrial machinery for preparing and manufacturing food or drink and parts thereof. The oven, however, was separately appraised at a value of $80,000.00, net packed, and was assessed with duty at the rate of 9.5 per centum ad valorem under the provision in item 661.30, TSUS, as modified by T.D. 68-9, for non-electric industrial ovens and parts thereof.

Plaintiff does not dispute the appraisement of the oven, but claims that the oven should have been classified under item 666.25, as was the other merchandise covered by the entry, concerning which there is no controversy.

I have concluded that the oven in question was properly classified by the customs officials under item 661.30, TSUS, as modified.

THE RECORD

The evidence of record consists of the oral testimony of two witnesses (Thomas Forte, plaintiff's purchasing director; and George Monaco, plaintiff's plant director) and three exhibits, introduced by plaintiff. Additionally the invoices attached to the official court papers were submitted by plaintiff and received in evidence without specific marking.

Plaintiff is engaged in the manufacture of various bakery goods such as cookies, Italian style breadsticks and crackers. The oven was imported with a number of other components of a so-called "breadstick production line". Subsequent to importation, the oven was used by plaintiff in the manufacture of bakery products, although it appears

from Mr. Forte's testimony that similar ovens were used by others in the manufacture of asphalt tiles (R. 28).

Forte stated that a breadstick production line "is a continuous line, as it were, from manufacture or mixing of the dough to the finished product going through a wrapping machine" (R. 8). Continuing, Mr. Forte described the operation of a breadstick production line as follows (R. 17–18):

> * * * We start with a mixing operation, which is the mixing of the dough. From this step, we go to a forming piece of equipment which forms, takes a bunch or wad of dough and shapes it into pencil-like sticks. After this form or shape, as it were, it will go through what we call a proofing box or proofing piece of equipment for proofing purposes. It will come out of the proofer and travel along a conveyor into the oven, where it is baked. From the oven, it is taken via another conveyor, and it is then dried, as it were and, from this conveyor, it is taken to a wrapping machine.

Plaintiff's other witness, Mr. Monaco, gave a similar description of the operation of a breadstick production line, starting with mixing equipment and terminating with packaging equipment (R. 32, 34–35, 44–45).

The record further shows that:

Bakery lines at plaintiff's plant have certain "common elements", such as mixing equipment, a system of conveyors, an oven and a packaging or wrapping machine (R. 7–8). All bakery lines follow the same general procedure, although producing different products. Some of plaintiff's equipment was purchased as "lines", while other equipment was purchased as individual pieces. Prior to the present importation, plaintiff manufactured breadsticks on a "line" created by assembling individual pieces of equipment, that plaintiff either built or purchased in the United States. Plaintiff's former breadstick line followed a sequence of mixing, proofing, cutting to size, baking in an oven, drying or cooling, and packaging (R. 8–9, 22–23). The present importation did not cover a complete breadstick line, since no packaging or wrapping machinery was included in the shipment (R. 42–43). Admittedly, in order to produce breadsticks, plaintiff required a complete line, which includes "packing facilities" (R. 44–45).

Opinion

Plaintiff maintains in its brief: "The TSUS Item 666.25 classification for 'Industrial machinery for preparing and manufacturing food or drink and parts thereof' is a classification controlled by actual use under General Interpretative Rule 10(e)". Further, plaintiff contends that "The classification of the oven portion of the integrated breadstick line should be controlled by its chief use, that of food processing machinery, i.e. that machinery which changes the character of the

food or advances it towards the condition in which it is used". Finally, plaintiff argues: "Assuming *arguendo* that the oven is not food processing machinery, the Bureau acted in an arbitrary and capricious manner by segregating only the oven portion for reclassification".

Defendant insists that classification of the oven under item 661.30 is "mandated by the language of the specific tariff provisions, an applicable headnote, and the codified rule of relative specificity".

There is no dispute in this case that the subject merchandise, an oven, is a non-electric industrial oven. Plainly, then, this oven is described in item 661.30, TSUS. Additionally, as defendant pointed out, heading 84.14 of the Brussels Nonmenclature (which is identical to item 661.30, TSUS, in order, language and phraseology) encompasses "Bakery ovens, including biscuit ovens". See *Explanatory Notes to the Brussels Nomenclature* (1955), Vol. III, Heading 84.14 (p. 791). In view of the identical phraseology in both Brussels heading 84.14 and TSUS item 661.30, the *Explanatory Notes* are a significant source of legislative history and of interpretation respecting item 661.30. *Mattel, Inc.* v. *United States*, 65 Cust. Ct. 616, 625–26, C.D. 4147 (1970).

The Tariff classification claimed applicable by plaintiff, item 666.25 is controlled by use (other than actual use), and consequently is to be determined in accordance with the chief use in the United States of the class or kind of merchandise to which the imported article belongs at, or immediately prior to, the date of importation. General Interpretative Rule 10(e). While the record merely establishes plaintiff's actual use of the oven subsequent to importation, and not the chief use in accordance with Rule 10(e),[1] defendant has nevertheless conceded in its brief that the oven is described in item 666.25, TSUS, as well as in item 661.30, TSUS. Thus, an issue of relative specificity of the two competing provisions is posed by virtue of General Interpretative Rule 10(c), which reads, so far as pertinent:

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically described it; * * *

In *F. L. Smidth & Company* v. *United States*, 56 CCPA 77, 85, C.A.D. 958, 409 F. 2d 1369 (1969), the Court of Customs and Patent Appeals construed the above-quoted statutory rule of relative specificity as follows:

> This [interpretative rule] appears to us to mean this: if an article is determined to be clearly described in two or more items, selection of the controlling item by relative specificity is manda-

[1] Mr. Forte admitted under cross-examination that while plaintiff's use of the oven was limited to bakery products, "some of the ovens we buy, either of domestic origin or imported, such as this one which is part of our line, they will use these similar ovens to make tiles, asphalt tiles * * *" (R. 28). Mr. Monaco was unable to state whether or not the oven in question was used for purposes other than manufacturing bakery products (R. 41).

> tory and takes precedence over other judge-evolved methods of resolving ambiguity, including resort to extrinsic aids such as legislative history.

As between item 661.30 and item 666.25, the provision which more specifically describes the oven herein is "the item having requirements which are 'more difficult to satisfy'." *Smidth, supra*, 56 CCPA at 85. The provision in item 661.30 for non-electric industrial ovens is plainly more restrictive and "difficult to satisfy" than item 666.25, which describes virtually every conceivable piece of machinery used industrially for preparing and manufacturing food or drink, including of course bakery ovens. Consequently, the imported oven is more specifically described by item 661.30.

A further reason why the oven is properly classifiable under item 661.30 rather than item 666.25 may be gleamed from headnote 1, part 4A, schedule 6, which reads:

> 1. A machine or appliance which is described in this subpart and also is described elsewhere in this part is classifiable in this subpart.

Item 661.30, TSUS, under which the oven was classified, appears in subpart A of part 4, schedule 6, while item 666.25, TSUS, claimed applicable by plaintiff, is found in subpart C of part 4, schedule 6. Hence, as between the two competing provisions, Congress has clearly manifested its intent in headnote 1, *supra*, that industrial ovens (i.e., bakery ovens) be classified in subpart A.

In its brief, plaintiff did not address itself to the significant questions raised concerning either General Interpretative Rule 10(c) or headnote 1, part 4A, schedule 6. Rather, plaintiff merely insists that it met its burden of proof under General Interpretative Rule 10(e) by showing that the oven was actually used as food processing machinery for 3½ years after it was imported. Clearly, this evidence of actual use, albeit unrefuted, does not fulfill plaintiff's burden of proof. Inasmuch as plaintiff failed to show that the imported oven is not described in item 661.30, the provisions of Rule 10(c) and headnote 1, *supra*, effectively negate the applicability of item 666.25, notwithstanding defendant's concession that the oven is also described in that provision.

Finally, when counsel for plaintiff was questioned by the Court at the trial as to whether plaintiff was claiming that a *complete* breadstick production line (including the oven) was dutiable as an entirety, counsel responded in the affirmative (R. 49). Nevertheless, plaintiff did not urge the entireties doctrine in its post-trial brief.

Fundamentally, if a *complete* breadstick production line were classifiable as an entirety, the oven component alone could not be subject to separate classification. See *Trans-World Shipping Service, Inc., et al.* v. *United States*, 58 Cust. Ct. 120, 124, C.D. 2900 (1967). But in the present case we need not consider whether or not a complete

breadstick line constitutes an entirety, since the testimony of plaintiff's witnesses obviously establishes that the shipment did not comprise a complete breadstick production line.

Both of plaintiff's witnesses repeatedly testified that a complete breadstick production line includes a packaging or wrapping machine (R. 8, 9, 18, 23, 32, 35, 45). And although Mr. Forte mentioned a wrapping machine as one of the pieces of equipment included in the entry (R. 18), Mr. Monaco, upon carefully examining the commercial invoice listing the imported equipment, reluctantly admitted on cross-examination that no wrapping or packaging equipment was included in the entry (R. 42–43). Therefore, since the entry did not include all the components of a complete breadstick production line, as described by plaintiff's witnesses, the invoiced equipment (which included the oven) could not properly be classified as an entirety under item 666.25. *Cf. United States* v. *Baldt Anchor*, 59 CCPA 122, C.A.D. 1051, 459 F. 2d 1403 (1972) (where entirety would have comprised six machines imported together in one shipment, five machines in shipment *held* not to constitute an entirety).

Under all the facts and circumstances, I conclude that the oven was properly classified by the customs officials as a separate item of merchandise under item 661.30, TSUS, as modified,[2] and therefore plaintiff's action is dismissed. Judgment will be entered accordingly.

(C.D. 4710)

LOHZIN & BORN, INC. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 72-11-02370

Port of Chicago

[Plaintiff's motion denied; defendant's cross-motion granted.]

(Dated August 3, 1977)

Schwartz & Lidstrom (*Thomas J. O'Donnell* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

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[2] As noted *supra*, plaintiff does not challenge the separate appraisement of the oven.

MALETZ, Judge: This action which is before the court on cross-motions for summary judgment involves the dutiable status of merchandise invoiced as metal ship ornaments, tin plate decorative sailing ships or tin plate sailing ship ornaments that were exported from Hong Kong and entered at the port of Chicago from January 1970 through March 1971. The importations were classified as other models under item 737.15 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9, and assessed duty depending on the date of entry at the rate of 24% ad valorem (1970) or 21% ad valorem (1971). Plaintiff claims that the metal sailing ship items (hereinafter referred to as "sailing ships") should be classified as articles of tin plate under item 657.15, TSUS, as modified by T.D. 68–9, and assessed duty at the rate of 8% ad valorem (1970) or 7% ad valorem (1971).

The parties have agreed that the sailing ships are wholly or in chief value of tin plate and that the imported merchandise is not chiefly used for the amusement of children or adults and is not a toy.

The pertinent provisions of TSUS are as follows:

Classified under:		
Schedule 7, Part 5, Subpart E:		
	Model trains, model airplanes, model boats and other model articles, all the foregoing whether or not toys; and construction kits or sets for making or assembling such model articles:	
737.05	Models of inventions and of other improvements in the arts, to be used exclusively as models	* * *
	Other models, and construction kits or sets:	
737.07	Rail locomotives and rail vehicles; railroad, and railway rolling stock; track, including switching track; rail depots, round houses, signal towers, water towers, and other trackside structures; trolley buses and trolley-bus systems; cable-car systems; highway vehicles; ships and harbor	

	structures; and airplanes and spacecraft; all the foregoing made to scale of the actual article at the ratio of 1 to 85 or smaller----------	* * *
737.09	Construction kits or sets with construction units prefabricated to precise scale of the actual article----------	* * *
737.15	Other----------	24% ad val. [1970] 21% ad val. [1971]

Claimed under:

Schedule 6, Part 3, Subpart G:

Subpart G headnotes:

1. This subpart covers only articles of metal which are not more specifically provided for elsewhere in the tariff schedules.

* * * * * * *

Articles of iron or steel, not coated or plated with precious metal:

Cast-iron articles, not alloyed:

* * * * * * *

Other articles:

657.15	Of tin plate----------	8% ad val. [1970] 7% ad val. [1971]

Plaintiff claims the government's classification is erroneous on the basis (1) that the importations are not within the common meaning of the term model; and (2) that the legislative history of item 737.15 indicates that only toy models or models which have the potential for amusement of the kind present in toys were intended to be classifiable thereunder.

Thus the issue in brief is whether the importations were correctly classified by the government as other models or whether they are properly classifiable as articles of tin plate.

A representative sample of the imported merchandise, consisting of a stylized metal characterization of a sailing ship, was submitted with plaintiff's motion for summary judgment. This sample is made of thin sheets of tin plate which were cut and formed to represent a sailing vessel approximately 15" high and 16" in length. The ship is elaborately decorated with embossed designs in the forms of windows and other decorations on the hull; the sails have a stippled or grained surface and are decorated with embossed shields and Maltese crosses; the rigging, masts and ladders are constructed of wire; and tin plate banners are atop each of the three masts. The entire sailing ship is painted a silver color which is heavily antiqued in black so that the silver shows through in a highly decorative manner. Although it appears from an examination of the sample that it is not an exact replica of a particular ship, it is nevertheless obvious that the ship represented is of the Armada-type such as the vessels used by Columbus in his voyage across the Atlantic.[1]

I

Against this background, plaintiff maintains that the importations are not models under the common meaning of the term. According to plaintiff, "a 'model' is something which represents, *with an appreciable degree of accuracy*, that which is already in existence; or that which, because of its qualities, may or should serve as something to be emulated" (plaintiff's reply br. p. 3, emphasis in original).

We, therefore, must consider whether the imports are models under the common meaning of that word.

It is well established that the common meaning of a tariff term is not a question of fact, but a question of law to be decided by the court. E.g., *United States* v. *National Carloading Corp.*, 48 CCPA 70, 72, C.A.D. 767 (1961). In customs jurisprudence, words are to be interpreted in their commonly received and popular sense in the absence of a contrary legislative intent or proof of a commercial designation that differs from the ordinary understanding of the term. And in determining the common meaning of a term, the court may rely on its own understanding and as an aid may consult dictionaries, lexicons, scientific authorities, and other reliable sources. See, e.g., Sturm, *A Manual of Customs Law* (1974), pp. 202 et seq.

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[1] In support of its cross-motion for summary judgment, the defendant has submitted an affidavit of an assistant district director of the Customs Service for the port of Buffalo. Accompanying this affidavit is an illustrative exhibit of a sailing vessel which on a smaller scale (approximately 6" high and 6" long) is substantially similar to the present importation except for the words "SANTA MARIA" which are embossed on the stand of the smaller article. The smaller item was purchased from the J. C. Penney Co. where it was packaged in a box labeled "COLUMBUS ARMADA—Decorative Replicas of the Nina, Pinta and Santa Maria," and had a $1.00 price tag affixed to it.

In an effort to aid the court in its determination of the common meaning of the term "model," plaintiff cites the following definition from *Webster's New International Dictionary* (2d ed. 1961):

> *model.* 1. A set of plans for a building to be erected, or of drawings to scale for a structure already built; sometimes, a ground plan, as of a garden. Obs. 2. That which exactly resembles something; a copy.
>
> * * * * * * *
>
> 3. A miniature representation of a thing; sometimes, a facsimile of the same size.
> 4. Style of structure; pattern; design; as, perfect in *model.*
>
> * * * * * * *
>
> 7. Something intended to serve, or that may serve, as a pattern of something to be made; as, the clay *model.*
>
> * * * * * * *

A similar definition is found in the *Funk & Wagnalls Standard Dictionary of the English Language, International Edition, Combined With Britannica World Language Dictionary,* (1963):

> model n. 1 An object, usually in miniature, representing accurately something to be made or already existing; more rarely, a plan or drawing: a *model* of a building.
>
> * * * * * * *
>
> 5. That which strikingly resembles something else; an approximate copy or image.
>
> * * * * * * *
>
> *Synonyms (noun):* archetype, copy, design ectype, example, facsimile, image, imitation, mold, original, pattern, prototype, replica, representation, type. A *pattern* must be closely followed in its minutest particulars by a faithful copyist; *a model may allow a great degree of freedom.* [Emphasis added in part.]

Referring to these definitions, the following aspects of the term "model" appear relevant to that term as it is used in the tariff schedules: "[a] miniature representation of a thing;" or "[t]hat which strikingly resembles something else; an approximate copy or image." Further, while "[a] pattern must be closely followed in its minutest particulars by a faithful copyist; a *model* may allow a great degree of freedom." In this context, plaintiff concedes that a model need not "perfectly depict the original in all respects"; however, it contends that "a point is reached where a representation of an object, because of its failure to adequately depict the characteristics of that object, cannot be termed a 'model' of the original object" (plaintiff's reply br. p. 3).

In this connection, plaintiff cites two Bureau of Customs rulings, reported in abstract form, which, plaintiff says, limit the tariff definition of "model" to that which accurately represents an existing article or that which serves as something to be emulated. Thus, in T.D. 66–38(14),[2] the Bureau ruled that:

> Miniature structures of garages, service stations, bungalows, ranch houses, etc., although recognizable as such, do not accurately represent existing structures, and are, therefore, classifiable under the provision for Toys * * * not specially provided for: * * * Other, in *item 737.90*, TSUS, and not under the provision for Other model articles * * * whether or not toys * * *: * * * Other models * * *: * * * Other, in *item 737.15*, TSUS. [Emphasis in original.]

The other Bureau of Customs ruling, relied on by plaintiff, reads as follows (T.D. 56448(13)):[3]

> A ship with a wood hull measuring 4″ x 1¼″ x ¾″ resembling a rowboat with a slightly elevated prow having a curved 1½″ x 2½″ piece of wood representing a sail painted with several Chinese characters and also having six stacked barrels amidship and seven kokeshi dolls seated at the side opposite the sail; classifiable under the provision for Articles not specially provided for, of wood in *item 207.00*, TSUS and not under the provision for Other models * * *: * * * Other in *item 737.15 as this ship does not represent a prototype which has existence in fact or in legend.* [Emphasis added in part.][4]

Not cited by plaintiff but also relevant to the problem is a third abstracted ruling of the Bureau of Customs, T.D. 56467(84).[5] In that ruling, the Bureau classified steam engines and turbines, and crystal lattice models, which were designed to show the spatial relations of atoms in a crystalline structure, as other models under item 737.15. In reaching this conclusion, the Bureau used the following rationale:

> *The provisions for models in Schedule 7, Part 5, Subpart E, are not limited to articles* used for model railroading, or for decorative purposes, or to articles *which exactly resemble the articles of which they are models, but includes articles which are recognizable representations of articles.* [Emphasis added.]

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[2] 101 Treas. Dec. 127 (1966).

[3] 100 Treas. Dec. 321 (1965).

[4] It is to be emphasized that in T.D. 56448(13) Customs found that the ship did not represent a prototype which had existence in fact or legend. Thus, Customs guidelines—at least to the extent of this ruling—were to the effect that a model need not represent an actual prototype and that a merely legendary prototype would suffice.

Webster's New International Dictionary (2d ed. 1961) defines the term "prototype" as "An original or model after which anything is copied; a primary form; pattern; exemplar; archetype; as the prototype of a species or of the novel."

[5] 100 Treas. Dec. 414 (1965).

From the foregoing abstracts, it appears that the Bureau of Customs definition of the term "model" would cover articles which (1) *accurately* represent a prototype which exists in fact or legend; and (2) articles which are *recognizable representations of articles.* These guidelines, it is to be added, are similar to those listed by the Tariff Commission in the *Summaries of Trade and Tariff Information*, Schedule 7, Volume 4 (1968) p. 172, where the following is stated with respect to the model provisions:

> The models classifiable under item 737.07 are limited to certain designated articles made to scale of the actual article at a ratio of 1 to 85 or smaller; item 737.09 provides for construction kits or sets with construction units prefabricated to precise scale; and item 737.15 covers both models and construction kits or sets not provided for by the two immediately preceding item numbers, including less exact representations of the original articles, but does not go so far as to cover merely the "crude form of a class of articles."

Moreover, there is no indication whatever that Congress intended the meaning of the term "models" as used in item 737.15 to be restricted to only those items which are either exact or accurate representations of existing articles. In fact, such an interpretation of the term "model" would extremely limit the scope of the model provisions. Under such an interpretation, none of the models which were held classifiable under item 737.15 as other models in *Hudson Shipping Co., Inc.* v. *United States*, 75 Cust. Ct. 26, C.D. 4606 (1975), would have qualified as models despite their fine detailing.[6] Nor would the extremely expensive boat models in *Arthur R. Sawers* v. *United States*, 60 Cust. Ct. 593, C.D. 3467, 285 F. Supp. 852 (1968), have qualified for classification under item 737.15 since some of the models were not exact or accurate replicas because they were constructed from memory and not from plans.

What is more, if Congress had intended the term "model" to include only exact models or accurate replicas of existing models, it would have had no need to specify in the article description for item 737.07 that the models covered thereunder must be made to scale of the *actual article* because it would have been so understood from the use of the term "model." Similarly, Congress would have had no need to specify in item 737.09 that the construction kits or sets for the making or assembling of models must have construction units prefabricated to the precise scale of the *actual article.* The obvious answer is that

[6] For example, in *Hudson Shipping* one of the models purportedly represented the clipper ship Great Republic which had been built in 1835 but was subsequently destroyed. Since only illustrations and paintings remained, the subject model could not have been an accurate or exact representation of an existing article.

Congress did not use superfluous words but wanted to make a distinction between items 737.07 and 737.09 on the one hand, and item 737.15 on the other hand. Items 737.07 and 737.09 were clearly intended to cover scale models built to scale of existing articles and kits or sets with construction units prefabricated to the precise scale of existing articles, whereas item 737.15 was intended to cover models and kits which were not quite so accurate or exact or may not even have had an existing prototype.

In short, to come within the common meaning of the term "model," an article need not be an exact or accurate representation of something in existence; it is sufficient if it is more than a crude form of a class of articles and recognizably represents an article that existed in fact or legend. There is no doubt that the importations in this case meet these requirements; for an examination of the representative sample leaves no doubt that it is a recognizable representation of a ship of the Armada-type.[7]

II

Plaintiff next argues that item 737.15 does not cover nontoy models but pertains only to those models which are toys or have the potential for amusement of the kind present in toys. In support of this contention, plaintiff claims that the legislative history of the model provisions demonstrates a clear intention to classify models which are not toys under items 737.05, 737.07 and 737.09, while item 737.15 covers only toy models.

Defendant, on the other hand, maintains that plaintiff's argument (1) is not supported by the legislative history; (2) ignores the statutory words "whether or not toys" in the applicable TSUS superior heading; and (3) would, in effect, restore the necessity for distinguishing between "toy" and "nontoy" models. For the reasons that follow, we agree with defendant.

It is undisputed that item 737.15 is an *eo nomine* provision. *Arthur R. Sawers* v. *United States*, *supra*, 60 Cust. Ct. 593, 285 F. Supp. 852. It is also basic that an *eo nomine* provision includes all forms of the named article unless a contrary legislative intent, judicial decision or administrative practice is shown. *C. J. Tower & Sons* v. *United States*, 30 Cust. Ct. 235, C.D. 1526 (1953). In view of this, the imported ship models would be classifiable under item 737.15 unless plaintiff can show by legislative intent, judicial decision or administrative practice that a contrary result was intended.

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[7] That the common meaning of the term "model" is not limited to exact or accurate replicas of existing objects is demonstrated by the illustrative exhibit captioned the "SANTA MARIA" (see note 1, *supra*) which bears a striking resemblance in style to plaintiff's importation, in the present case, as typified by the representative sample. Since the "Santa Maria" is sold and bought as a "replica," i.e., a model, it would seem that plaintiff's merchandise should similarly be considered a replica or model.

Reviewing first the legislative background of the model provisions, it is to be observed that prior to the enactment of the Tariff Schedules of the United States, the only specific provision for models was contained in paragraph 1720 of the Tariff Act of 1930 which provided for models of inventions and other improvements in the arts to be used exclusively as models. Under the 1930 Act, other "models" were classified as toys, if they were chiefly used for the amusement of children,[8] or were classified under various basket provisions (e.g., under paragraph 353 as electrical articles or paragraph 397 as articles of metal) if they were chiefly used by adults. In adopting the tariff schedule provisions covering models, it was the stated intent of the Tariff Commission "to eliminate the existing difficult requirement of distinguishing between the 'toys' and the 'nontoys'." *Tariff Classification Study* (hereinafter referred to as "*Study*"), Schedule 7, p. 291 (1960).

However, the initial draft provisions failed to accomplish this purpose since the definition of a "toy" in the proposed tariff schedules was extended to include adults as well as children. The result was that certain model items, previously classified under various basket provisions, were now subjected to substantially higher rates because they qualified as adult toys. These inequities were pointed out to the Tariff Commission at the hearings held in December of 1958 and in follow-up letters suggesting changes. See *Study*, Schedule 7, pp. 666–75, 777–79 (1960). As a result, the following changes were made: (1) the superior article heading applicable to all model provisions was revised to make it clear that model trains, model airplanes, model boats, and other model articles included toys as well as nontoys;[9] (2) a new item 737.07 was carved out of item 737.15 to preserve the substance of the existing customs practice with regard to certain models used by adults;[10] and (3) item 737.10 was renumbered.

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[8] Paragraph 1513 of the Tariff Act of 1930 defined toys as articles chiefly used for the amusement of children. Under the Tariff Schedules of the United States toys are defined as "any article chiefly used for the amusement of children or adults" (Schedule 7, Part 5, Subpart E, headnote 2).

[9] The superior heading preceding the model provisions of Schedule 7, Part 5, Subpart E, was amended by adding the term "whether or not toys," as follows:

> Model trains, model airplanes, model boats and other model articles, all the foregoing whether or not toys: and construction kits or sets for making or assembling such model articles: [Emphasis added.]

[10] The following explanation in the *Study, First Supplemental Report*, p. 81 (1962), illustrates the reason for the change:

> An effort was made to resolve the model train issue in the original draft schedule on which public hearings were held in December 1958. As a result of testimony and statements received from an interested importer in connection with that hearing, the provisions of item 737.07 were incorporated in the proposed schedule to preserve the substance of the practice with respect to locomotives and railroad rolling stock of types used by adult hobbyists. Other types of imports were brought to the attention of the Commission in connection with the public hearing on this first supplemental report in proposed form. The foregoing change in item 737.07 takes into account the latest existing customs practices in regard to this matter. See CAD 746.

Plaintiff, however, has misconstrued this change in making the following contention (plaintiff's br. p. 10):

> Thus, it is clear that in the *first* proposed provisions covering models, the Commission contemplated classifying *all* model trains, boats, and airplanes as toys in item 737.15. As shown previously, however, when it was pointed out to the Commission that certain nontoy articles would fall within item 737.15 as proposed, the Commission readily changed the proposed provisions so as to exclude these nontoys from item 737.15. [Emphasis in original.]

Plaintiff points to no specific legislative history to support its novel theory that the so-called basket provision for models pertains only to toy models. Quite the contrary, as stated before, the legislative history makes it clear that the Tariff Commission adopted the model provisions in order to eliminate the then existing difficult task of distinguishing between toys and nontoys. (Yet under plaintiff's theory, classification under item 737.15 would invariably require a determination of whether a particular model was or was not a toy.) And the Tariff Commission concluded that the only way to eliminate the problem of distinguishing between toy models and nontoy models was to classify them both under the same provision, item 737.15. This, of course, would result in a higher rate of duty for some items (i.e., the nontoy items not classifiable under items 737.05 through 737.09); however, it would seem that the Tariff Commission was aware of the higher rates for some items when it pointed out that the "*great bulk*" of the articles covered by item 737.15 was previously dutiable under paragraph 1513 of the Tariff Act of 1930 at the rate of 35%. See *Study*, Schedule 7, p. 293. In fact, it is for the very reason that the proposed basket provision for models resulted in an increased duty on some model articles that Congress carved item 737.07 out of item 737.15 and thus reduced the rate on some additional model items which otherwise would fall under the basket provision. See *Study, First Supplemental Report*, p. 81 (1962).

Nevertheless, plaintiff disagrees and, in order to prove its contention that nontoy items were not intended to be classified under item 737.15, cites the *Study, Interim Report*, March 15, 1955,[11] which indicates that unless it cannot be helped, the proposed revised schedules shall not include changes in rates. Plaintiff reasons that to classify certain nontoy items under that provision at the rate of 35% duty would increase the duty on articles such as the importations [12] by a

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[11] This report is reproduced at *Study, Submitting Report*, Appendix A, p. 31 at pp. 54-56.

[12] Plaintiff maintains (br. p. 14) that under the 1930 Act the importations would have been classifiable as ornamental articles of metal.

rate of 23% and thereby thwart the previously stated congressional intent. However, it is well recognized that the tariff schedules superseded the old schedules and did not merely constitute a restatement of the Tariff Act of 1930 with discrepancies settled by adhering to the old act rates. *F. L. Smidth & Company* v. *United States*, 56 CCPA 77, C.A.D. 958, 409 F. 2d 1369 (1969); *Pacific Suppliers, Ltd.* v. *United States*, 62 Cust. Ct. 517, 522, C.D. 3819, 299 F. Supp. 1134 (1969). Furthermore, with regard to the model provisions, the Commission never indicated that all of the articles covered under the proposed item 737.15 had been previously covered at the 35% ad valorem rate as toys. To the contrary, the Commission explained that some articles had not been covered under paragraph 1513 and that *the existing rate was maintained only to the extent possible*. See *Study*, Schedule 7, p. 291. Thus, rather than relying on rates to determine whether the importations are of the type of articles intended to be encompassed under item 737.15, it is clear that the legislative intent was to include both toy and nontoy models in that provision regardless of rates.

Turning next to prior judicial decisions, we find that case law supports the classification of nontoy models under item 737.15. Thus in *Arthur R. Sawers* v. *United States, supra*, 60 Cust. Ct. 593, 285 F. Supp. 852, hand-crafted wooden and ivory ships which were used for display and were obviously not toy models were held properly classifiable under item 737.15. And in *Hudson Shipping Co., Inc.* v. *United States, supra*, 75 Cust. Ct. 26, the importations were impressive looking ship models and construction kits which purported to be scale models. These models which were display items mounted on pedestals and obviously not toys were nonetheless held classifiable under item 737.15 as other models. In the *Hudson* case the court reviewed the entire legislative history surrounding the model provisions and then stated that "* * * all merchandise enumerated in the superior heading applicable to items 737.05 through 737.15 and not specifically provided for under items 737.05, 737.07, and 737.09, is provided for under item 737.15." *Id.* at 48.

Plaintiff's contention that only toy models come within the purview of item 737.15 is further demonstrated to be incorrect by the holding in *Associated Hobby Manufacturers, Inc.* v. *United States*, 65 Cust. Ct. 357, C.D. 4103 (1970), *aff'd*, 59 CCPA 54, C.A.D. 1037, 452 F. 2d 1405 (1972). In that case, scale models of mechanized equipment used in construction work were classified under item 737.15 even though the models were built to scale at the rate of 1 to 87 and were used as accessories for HO scale model railroads. The only reason these scale models were not classifiable as models of highway vehicles as specified under item 737.07 was because their prototypes were not within the common meaning of the term "highway vehicles." There is no doubt that the HO models in the *Associated Hobby* case, were not toys; nevertheless, they were classified under item 737.15—and this because they did not meet the requisites of item 737.07.

For the foregoing reasons, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and the action is dismissed.

(C.D. 4711)

RUDOLPH MILES & SONS, INC., A/C THOMAS P. GONZALEZ CORP. *v.* UNITED STATES

Chili peppers

CONFLICTING EVIDENCE–SAMPLES–SHAPE AND SIZE

Chili peppers exported from Mexico in 1973 and 1974 and classified in liquidation under TSUS item 161.80, the provision for anaheim and ancho peppers, *Held*, not classifiable as claimed by the importer under TSUS item 161.83, the provision for peppers other than anaheim and ancho peppers, where, although testimony of witnesses regarding nomenclature of the imported peppers and as to regional terminology applicable to the merchandise in Mexico is conflicting, official samples from the imported peppers reveal a *wideness* in shape and size, among other things, in conformity to the standard description for ancho peppers, whereas samples presented by the importer and reportedly taken from importations before the court reveal a *narrowness* in shape and size, among other things, in conformity to the standard description for pasilla peppers.

Court Nos. 74–8–02220 and 74–11–03241

Port of El Paso

[Dismissed.]

(Decided August 12, 1977)

Glad, Tuttle & White (*Edward N. Glad* and *T. Randolph Ferguson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this consolidated action consists of dried, unground chili peppers which were exported from Mexico during the period between May, 1973 and March, 1974, and classified in liquidation upon entry at the port of El Paso, Texas, under TSUS item 161.80, the provision for anaheim and ancho peppers, at the duty rate of 5 cents per pound. It is claimed by the plaintiff that the merchandise is properly classifiable as unground capsicum or cayenne or red peppers other than anaheim and ancho peppers under TSUS item 161.83 as modified by T.D. 68–9, at the duty rate of 2.5 cents per pound. It is conceded by the parties that the merchandise in issue is not anaheim peppers.

The question presented for determination in the case is whether the imported chilies are "anchos" as contended for by the government or "pasillas" as claimed by the importer.

Testimonial and other evidence in the record bearing on the issue is conflicting. Thomas P. Gonzalez, president of the ultimate consignee, and who has been buying peppers such as those at bar for 40 odd years, testified (R. 15–16):

Q. Would you tell me what types of peppers you bought that were covered by these particular entries?

A. This importation, on one of my trips to Mexico, I purchased.

JUDGE RICHARDSON: Which case are you referring to now? You have two cases here.

THE WITNESS: I am referring to both.

JUDGE RICHARDSON: All right.

A. (Continuing) On trips that I made to Mexico, which I call buying trips, to purchase peppers. On both occasions, I was there prior to the shipments and purchased the chilis known as chilis pasillas, and I instructed the sellers to ship them. One of these entries in this case contain different chilis than the chili pasillas.

Q. Mr. Gonzalez, do you usually receive the chilies in the United States that you purchased from these farmers in Mexico when you are traveling in Mexico?

A. Do you mean, do I personally receive them?

Q. Do you get what you buy?

A. Yes, usually.

The witness identified exhibits A through I as being chili pepper samples from particular entries before the court. He also identified exhibits 1 through 3 as being samples of chili peppers sent to him by or at the direction of his customhouse broker at El Paso right after entries before the court were made, and said to have been taken from particular entries before the court, in keeping with his company's customary business practice of keeping and retaining for long periods of time samples sent by the customs broker. Although the witness was of the opinion that exhibits A through I were not identical in shape to exhibits 1 through 3, he was of the opinion that the chili pepper samples exemplified in exhibits A through I were of the same variety as those exemplified in exhibits 1 through 3. The witness identified them all as pasillas.

The witness identified exhibit 4 as a sample of merchandise received under entry 110939 which was purchased in a different area in the state of Chihuahua, Mexico, and which is known as a chilaca or hot pepper. The invoice in entry 110939 in court No. 74–11–03241 to which the witness refers describes the merchandise as "chile colorado seco."

Mr. Gonzalez testified that the ancho pepper is of a wide configuration. It is called ancho because of its shape, the term meaning "wide" in Spanish; and translated into English means "very wide pepper."

According to the witness the ancho is also characterized by its wrinkly skin; and is very dark red in color, almost black; but not as black as the pasilla pepper. Mr. Gonzalez stated that there is no regional difference with respect to the way the ancho pepper is described in Mexico. The ancho pepper is always called "ancho." He said that because it is such a well-known pepper which is only grown in a certain area it has always been "ancho," and has never had a different name in Mexico. There isn't any confusion in Mexico with regard to the "ancho."

With respect to the pasilla pepper Mr. Gonzalez testified that it is smaller than the ancho; it runs from narrow to a little wider than the anaheim which is longer and narrower than the ancho. The pasilla, almost tends to be black in color; it has less red color units than the ancho. Mr. Gonzalez stated that the pasilla pepper is always referred to as "pasilla" in the interior of Mexico and in Baja, California. And when asked on cross-examination if he ever noticed regional differences with respect to the way a pasilla pepper is described, the witness answered, "not too much on that one."

Dr. Roy M. Nakayama, associate professor of horticulture at New Mexico State Unitversiy was called as a witness on defendant's behalf. The witness has a bachelor of science degree from New Mexico State University where his major field was in agricultural botany, a master's degree in the areas of plant pathology and mycology from Iowa State University, and a Ph. D. degree from Iowa State University where his major fields of concentration were in horticulture, plant breeding, and plant pathology. He has authored four research reports on chili agriculture, varieties, and descriptions, has written articles on chili research which have been published in newspapers and magazines, and holds membership in professional associations concerned with chilies.

With respect to Mexican chilies, Dr. Nakayama testified that he has traveled in Mexico, has observed chili fields in central Mexico, talked with farmers and other people regarding chili, and is aware of the terminology these people use to describe chili. The witness, although admitting that he has had no experience with commercial chilies as such, stated that anchos are not grown commercially in Mexico but in gardens for local sales, primarily because of demand. As to terminology Dr. Nakayama testified (R. 61–62):

Q. Have you noted at all whether or not there are regional differences in Mexico to describe an ancho pepper, or something which you would refer to, or what would be referred to in the United States, as "ancho pepper?"

A. Yes, I have run up against that in the area along the Rio Grande, generally west and adjacent to Brownsville, Texas. They grow chili that fits the description, the fruit description of ancho, but they refer to it as a chili mulatto.

Q. Have you run into any other differences?

A. There are some that are called—very similar shaped pepper to the ancho—pasilla.

The witness pointed out that in identifying chili pepper the primary points he considers are general shape and size configuration and the texture of the fruit after it is dried, noting that some characteristics of chilies cannot be determined until they are dry.

Dr. Nakayama examined and identified exhibits A through I as anchos, and exhibits 1 and 2 as pasillas. He compared exhibit 2 with exhibits C, D, and E and stated that they are different varieties of peppers. The witness also agreed with the description of an ancho chili in exhibit L which he said is a grower's guide put out by Petoseed Company primarily for commercial growers. On pages 38 and 39 of exhibit L an ancho 101 pepper is described as "Dimpled, broad, tapering to a point," measuring "5½" inches long by "2½" inches in diameter, with flesh and color described as "Medium thick, mildly pungent, blackish-green."

Plaintiff contends that it has made a *prima facie* showing the merchandise covered by 15 of the 16 entries before the court consists of pasillas chili peppers and that of the 16th entry consists of chilaca chili peppers, and further, that defendant has failed to controvert plaintiff's evidence. Defendant contends that the questionable, vague, and circumstantial evidence offered by plaintiff is insufficient to rebut the presumption of correctness attaching to the classification of the imported peppers, and that there is no testimonial evidence that pasilla or chilaca peppers were in fact imported.

Although the evidence in the record is conflicting for the most part, the parties agree that the ancho variety of chili pepper is characterized by a wideness in body. And this wideness in physical appearance finds support in the description given of an ancho 101 pepper in exhibit L in the expression "broad," and in the measurement "5½" inches long by "2½" inches in diameter. Apparently, exhibit L addresses itself to description of fresh peppers judging from the fact that all of the varieties of peppers shown in the exhibit are of chilies in their fresh state.

Although some of the official samples taken at the time of entry of the imported chiles are no longer useful for examination purposes by reason of physical deterioration, others of them are still in a good state of preservation. One such remarkably well preserved official sample is the one identified as exhibit C, which resembles a bell pepper and at its widest point measures about 2½ inches and at its longest point measures 3½ inches. The sample is dried, flat, with skin wrinkled like a prune, and color varying from dark red to black.

On the other hand, the specimens in exhibit 2, long, thin peppers, with which exhibit C was compared by the witnesses Gonzalez and

Nakayama, measure about 1¼ inches in width by about 5¼ inches in length, and are dried, flat, with skin texture wrinkled like a prune, and are black in color with streaks or flecks of brown. Exhibit 2 specimens fit the description for dried pasilla chili peppers. When exhibit C is laid side by side with specimens in exhibit 2 the two give evidence of being distinctly different varieties of chili peppers in the court's view. Exhibit C is the essence of *wideness* while the specimens in exhibit 2 are the essence of *narrowness*, and this in a context in which shape and size are admittedly dominant factors in the identification of varieties of chili peppers. Allowing for shrinkage due to age and dryness, these exhibits appear to be dried anchos and pasilla varieties of chili peppers, respectively. As such, the court cannot see how the two varieties of peppers could be covered by any one entry and given a single classification.

Mr. Gonzalez has testified that samples designated as exhibits 1 through 3 were sent to him at the instance of the broker who made the representation to him that they were taken from entries of merchandise before the court. And on that basis the samples were received in evidence under the business entry rule. But this is not the same as establishing that these samples are in fact from the entries at bar. Evidence of such quality could only come from someone shown to be in a position to connect the samples with the entries at bar. *Cf. Romicks International, Inc.* v. *United States*, 64 Cust. Ct. 316, C.D. 3997 (1970). In this case that person would be the person who withdrew the samples. And such a person was not called as a witness to connect plaintiff's samples with the entries before the court. Consequently, the statement that exhibits 1 through 3 are *said* to be samples taken from entries before the court, without connection, does not establish the fact.

Moreover, in the case of the peppers covered by entry 110939 dated January 29, 1974 of protest 74–11–03241, plaintiff has introduced through Mr. Gonzalez samples which are likewise *said* to be taken from this entry and designated as exhibit 4. However, these samples, characterized by the witness as chilaca chilies, exhibit even a starker contrast in terms of size and shape when compared with exhibit C. A typical specimen from exhibit 4 measures ½ inch at its widest point, and 2¾ inches in length, is flat and, is colored dark red. Also, on the invoice the merchandise of this entry is not described as "chilaca" peppers, but is designated as "chile colorado." And no explanation has been offered by plaintiff to reconcile or explain the difference in terminology employed by the witness Gonzalez in relation to specimens in exhibit 4 and terminology contained in the invoice to describe the merchandise covered by this entry.

Further, although the witness Gonzalez testified that no regional confusion exists with respect to terminology employed in the chile

pepper industry to describe ancho and pasilla peppers, this testimony is not entirely supported by the record. In entries 116434, 116496, and 116497 covered by protest 74–8–02220 in which official samples were withdrawn upon entry, the merchandise was described on the invoices as "chile pasia" or "chile pasilla." However, in each instance the customs inspector noted on the invoices that the bags or sacks were marked "chile ancho."

The court finds the classification of the imported peppers as anchos is supported by the evidence in the record, and plaintiff has failed to present evidence to rebut that classification. The action must, therefore, be dismissed. Judgment will be entered accordingly.

(C.D. 4712)

ARNOLD PICKLE & OLIVE CO. *v.* UNITED STATES

Cucumbers in brine

COLLATERAL ESTOPPEL

A decision in which the appraised value of merchandise is allowed to remain in effect, not as the result of a finding as to its correctness, but because plaintiff, after proving the error of the appraisement, fails to prove the correct value, does not estop plaintiff in a later case from litigating the issue of the correct value of identical merchandise imported under identical circumstances. *J. E. Bernard & Co., Inc.* v. *United States*, 66 Cust. Ct. 545, R.D. 11739, 324 F. Supp. 496 (1971) distinguished.

Court Nos. 73–7–01647 and 73–7–01648–S

Port of Nogales

[Plaintiff's motion for partial summary judgment granted; defendant's motion for judgment on the pleadings denied.]

(Dated August 17, 1977)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

Memorandum Opinion and Order

WATSON, Judge: In these cross-motions plaintiff seeks partial summary judgment and defendant seeks judgment on the pleadings. Both parties rely on the similarity of the circumstances of this case to those in *Arnold Pickle & Olive Co.* v. *United States*, 75 Cust. Ct. 154, C.D. 4620 (1975), the record of which has been incorporated herein.

In that case, owing to a lack of proof of costs of inspecting and grading certain Mexican cucumbers plaintiff failed to prove the claimed export value of its imported cucumbers. In other respects plaintiff won a "moral" victory. The court found the appraisement erroneous in that it was based on nonexistent sales between plaintiff and Pickle-Mex, its agent or alter ego in Mexico. Pickle-Mex bought the cucumbers from the farmers, inspected them, graded them and placed them in brine for export. The court also agreed with plaintiff's argument that although the Tariff Schedules spoke of the importation as a unitary article (vegetables in brine), it would be proper to prove the export value by combining the price at which the farmers sold the cucumbers to Pickle-Mex with Pickle-Mex's costs of readying and packing the cucumbers for shipment to the United States.

Plaintiff, relying on the affidavit of Byron Arnold Jr., general manager of plaintiff and one of the partners in Pickle-Mex, attesting to the facts the merchandise involved in this case and the circumstance of its exportation are identical with those involved in the prior case (with the exception of certain identified entries in which ice was not used) seeks a partial adjudication which would duplicate the findings in plaintiff's favor made in the first case and leave for trial only the question of the amounts of inspection and grading costs required to complete proof of export value.

Defendant, in support of its motion, seeks application of the doctrine of collateral estoppel, to the effect that the correctness of the appraised value of identical merchandise, having been upheld in the first case, is an issue which plaintiff is estopped from raising in this case.

A proper understanding of the first case, however, does not permit the application of collateral estoppel in the manner desired by defendant and requires the denial of defendant's motion. When the court left the appraised value undisturbed in the first case it did not do so as a result of a positive determination the appraisement was correct. In fact, the court determined the appraisement was erroneous. However, since it is a peculiarity of customs law that plaintiff must also prove the correct appraisement and since plaintiff failed to do so the erroneous appraisement remained in effect. That result is not the proper subject for an estoppel in a later case because it was not a precise determination in defendant's favor on the issue of valuation.

In contrast, certain issues between these parties were decided in the full sense of the word in the first case. The relationship between plaintiff and Pickle-Mex was found to be too intimate for a sale to take place between them. The proper transaction from which to begin the determination of export value was found to be the sales of cucumbers from Mexican farmers to Pickle-Mex and it was further found correct to arrive at the export value by adding to those prices

the costs incurred by Pickle-Mex in inspecting, grading and packing the cucumbers in brine for export. In a second case involving identical merchandise imported under the same circumstances it would be proper to estop the parties from contesting these issues. But it could not be correct to estop them from litigating an issue which was not resolved in the first case—the correct value of the imported merchandise.

In this respect these circumstances differ dramatically from the facts in *J. E. Bernard & Co., Inc.* v. *United States*, 66 Cust. Ct. 545, R.D. 11739, 324 F. Supp. 496 (1971). In that case, which marked the first reasoned application of the collateral estoppel doctrine to reappraisement litigation in this court, the prior decision from which the estoppel derived had reached a definite conclusion as to the correctness of the appraised value. Consequently, in the later case plaintiff was properly estopped from relitigating the issue of the value of identical merchandise imported under identical circumstances. Here the correct value of the merchandise remains an open question.

Based on the supporting affidavit to plaintiff's motion which establishes the facts here as being identical to those in the first *Arnold Pickle* case and based on all the papers and proceedings had herein, it is hereby

ORDERED, DECIDED, AND ADJUDGED as follows:

1. The merchandise in issue, cucumbers, packed in brine, exported from Mexico, is subject to appraisement on the basis of export value, as defined in section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

2. There were no sales of the merchandise in issue between the partnership firms of Pickle-Mex and Arnold Pickle & Olive Co. which could support a finding of export value.

3. The appraisement of the merchandise in issue upon liquidation was erroneous as it was predicated on the existence of sales between the partnership firm of Pickle-Mex and Arnold Pickle & Olive Co.

4. The principal market for the cucumbers in issue was Caborca, State of Sonora, Mexico.

5. The merchandise in issue was, in the principal markets of Mexico, at the times of exportation freely offered for sale for export to the United States by independent farmers in the ordinary course of trade at prices which did not vary by quantity and were arrived at by arm's length negotiation, but which did not include the costs and expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

6. The prices at which the independent farmers in the principal markets of Mexico, at the times of exportation of the merchandise in issue, freely offered such merchandise in the usual wholesale quantities and in the ordinary course of trade for exportation to the United

States, were prices which constitute an export value for such cucumbers, exclusive of the cost of their packing.

7. The said export value prices of the independent farmers, as stated in paragraph 6 above, and exclusive of the costs of packing, were as follows, by grade of cucumbers:

Grade	*Price – Per Hundredweight – Pounds*
No. 1	U.S. $4.99
No. 2	U.S. $3.99
No. 3	U.S. $2.99
Nos. 4 & 5	U.S. $1.50

8. The export values, section 402(b), Tariff Act of 1930, of the merchandise in issue, exclusive of the cost of packing, are the prices stated in paragraph 7, above.

It is further ORDERED that defendant's motion for judgment on the pleadings be, and the same hereby is, denied.

(C.D. 4713)

CIBA–GEIGY CORPORATION *v.* UNITED STATES

Benzenoid structure

EXCLUSION FROM "BENZENOID" PART OF SCHEDULE 4

A cyclic organic chemical product, whose benzenoid structure is the same as that of its natural precursor material but was derived, not intact from that material, but following a sequence of production in which the original benzenoid structure was changed to a quinoid structure and then back to benzenoid, is not a product excluded from classification in the "benzenoid" part of schedule 4. Headnote 3 to part 1 of schedule 4 excludes only products whose benzenoid structure is derived intact from the naturally occurring benzenoid structure.

Court No. 74–8–02267

Port of New York

[Judgment for defendant.]

(Decided August 24, 1977)

Bronz & Farrell (*George Bronz* and *Edward J. Farrell* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

WATSON, Judge: Plaintiff is challenging the tariff classification of an imported antibiotic drug with the trademark name of Rimactane. It was classified under item 407.85 of the Tariff Schedules of the

United States (in the "benzenoid" part of schedule 4) as a drug obtained, derived or manufactured from a product provided for in schedule 4, part 1A or 1B, and assessed with duty at the rate of 1.7 cents per pound plus 12.5 percent ad valorem. Plaintiff claims it does not belong in the "benzenoid" part of schedule 4 and should be classified under item 437.32 as an antibiotic processed beyond the natural state, dutiable at the rate of 5 percent ad valorem.

Plaintiff relies on headnote 3 to part 1 of schedule 4 [1] which it claims has the effect of removing Rimactane from the normally tenacious coverage of the part as expressed in its headnote 1.[2]

Headnote 3 provides that part 1 of schedule 4 does not cover cyclic organic chemical products having a benzenoid, quinoid or modified benzenoid structure, which are produced from animal or vegetable products in which such structure occurs naturally.

Rimactane is unarguably a cyclic organic product with a benzenoid structure. The dispute centers on the nature and origin of the benzenoid structure.

Plaintiff argues that the benzenoid structure in Rimactane is the same as that found in rifamycin B, the natural, mold-produced precursor material. Defendant replies that in the intermediate stages of producing Rimactane the benzenoid structure of rifamycin B is changed to a quinoid structure making the ultimate reversion to a benzenoid structure a synthesis and not the continuation of the selfsame original natural structure required by headnote 3. Plaintiff seeks to minimize the distinction between benzenoid and quinoid drawn by defendant and further emphasizes the unchanged presence of the same basic ring structure at all stages of the production of Rimactane.

In light of my understanding of headnote 3, I conclude Rimactane cannot benefit from its exclusionary effect. The most straightforward reading of the headnote is to require the benzenoid structure of the imported product to be the very same structure found in the original animal or vegetable product from which it was produced. By this I mean the original structure, be it benzenoid, quinoid, or modified benzenoid, must remain identifiable at all distinct stages of the production process.

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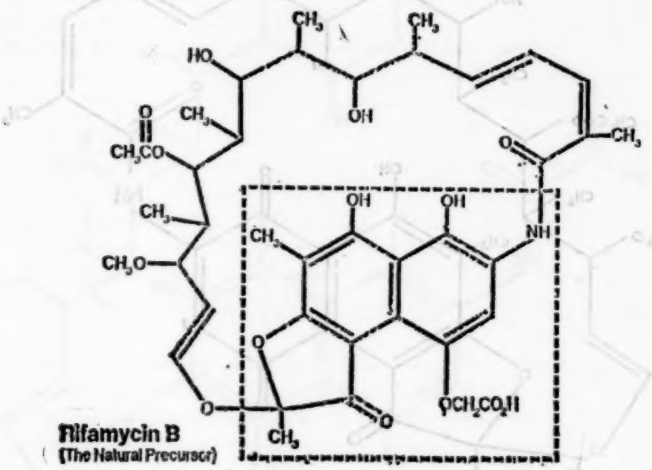
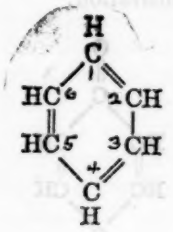
[1] 3. With the exception of the natural products provided for in subpart C, this part does not cover cyclic organic chemical products (such as, but not limited to, tannic, gallic and pyrogallic acids; estrone, estradiol, and corticosteroids; morphine, ergot, and cinchona alkaloids; rotenone; phenylalanine; tyrosine; epinephrine; and thymols) having a benzenoid, quinoid, or modified benzenoid structure, which are produced from animal or vegetable products in which such structure occurs naturally, unless such cyclic organic chemical products were obtained, derived, or manufactured in part from any product provided for in subpart A, B or C of this part.

[2] 1. Except as specifically set forth in the headnotes to other parts of this schedule, all products described in this part shall be classified hereunder even if more specifically described elsewhere in this schedule. Any product described in both subparts B and C of this part shall be classified in subpart C.

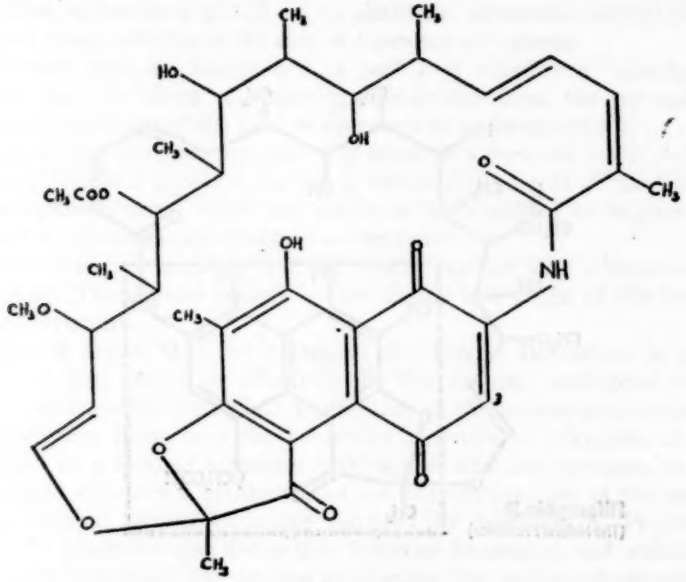
The molecular structure of rifamycin B, the precursor material, is depicted as follows in plaintiff's exhibit 2 (which is essentially the same as defendant's exhibit A). The area of special interest is defined by a dotted line. Within those lines our attention will be particularly drawn to the hexagonal ring on the right side.



Both the right and left rings in this structure are properly identified as benzenoid by virtue of their resemblance to the structure of the compound benzene as shown in the following illustration:

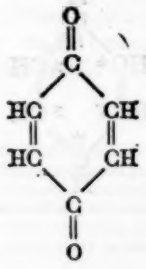


The first intermediate product, known as rifamycin S, represents a modification of the right ring of the initial benzenoid ring structure characterized by the bonding of oxygen atoms at positions 1 and 4. It is depicted as follows in defendant's exhibit C:



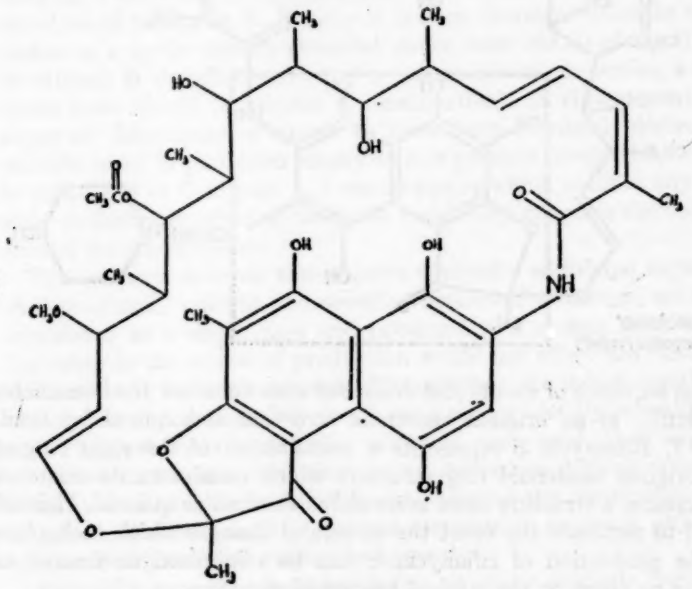
Rifamycin S

As pictured above the ring structure has been transformed to one which most closely resembles the structure of the compound quinone as shown in the following illustration:



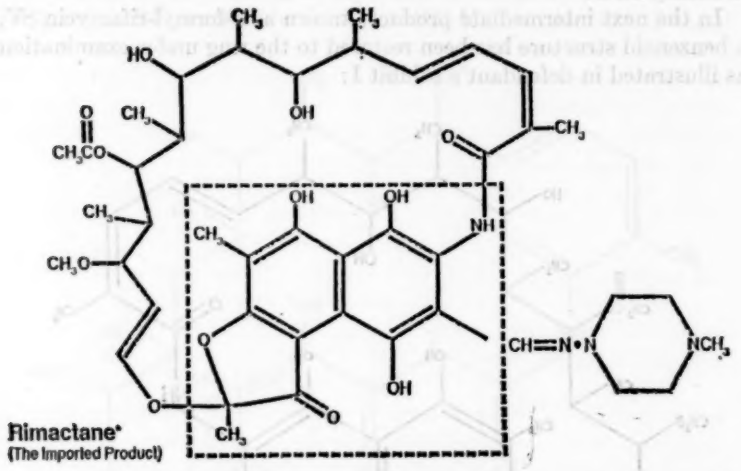
The ring structure of rifamycin S is therefore most accurately described as quinoid and is no longer the same structure as appeared in rifamycin B.

In the next intermediate product, known as 3-formyl-rifamycin SV, a benzenoid structure has been restored to the ring under examination as illustrated in defendant's exhibit I:



Rifamycin SV

The restored benzenoid structure is then retained in the structure of the final product, Rimactane, as illustrated in plaintiff's exhibit 1:



The sequence of events just described does not show the identifiable continuity of an original benzenoid structure as required by headnote 3. Rifamycin S represents a modification of the right ring of the original benzenoid ring structure which terminates its existence and creates a structure most accurately described as quinoid. Plaintiff failed to persuade the court the structural changes which took place in the production of rifamycin S can be minimized or treated as having no effect on the original benzenoid structure.

The court cannot subscribe to plaintiff's argument that the fundamental relevant structure is only the skeletal carbon ring and its associated electrons (the aromatic sextet) and that the bonding to oxygen which creates the quinoid resemblance has no more significance in principle than the addition of a peripheral hydroxyl or acetyl group. The headnote in question does not treat the subject in such an irreducible and abstract manner. It speaks of specific and distinct structures, characterized by their resemblance to the compounds benzene or quinone. When a strong resemblance to quinone supplants the resemblance to benzene in the course of production, the original benzenoid structure is at an end.

At the stage of rifamycin S the bonding of two oxygen atoms to the right ring has the unavoidable significance of transforming the ring structure to one which resembles quinone, not benzene. The subsequent restoration of benzenoid structure at the next intermediate

stage (3-formyl-rifamycin SV) is not a continuation of the original, natural benzenoid structure, but the synthesis of such a structure.

The benzenoid structure of the imported Rimactane can therefore be recognized as synthetic, derived as it was from the benzenoid structure of 3-formyl-rifamycin SV, which in turn was synthesized from the quinoid structure of rifamycin S. The quinoid structure of rifamycin S was itself synthesized from the original natural benzenoid structure of rifamycin B. Rifamycin S must therefore either be classifiable as a cyclic organic chemical under item 403.60 of the TSUS (a subpart B classification) or, if it has medicinal properties, a drug under item 407.85 (a subpart C classification). In either event, the imported Rimactane is shown to have been obtained, derived or manufactured in part from rifamycin S, a product provided for either in subpart B or C of part 1, a circumstance which nullifies any possible exclusionary effect of headnote 3 and fully supports the correctness of the classification.

The previous analysis also negates plaintiff's additional argument that benzenoid, quinoid and modified benzenoid structures are to be considered as a single class and presumably, a change from one to the other in the course of production would not affect the "natural" occurrence of the final structure. Though they are linked together in the statute and though they may have a strong "family resemblance" and even occasionally describe the same compound, their separate enumeration requires that they be considered as distinct structures when it is reasonable to do so. In this instance the description of the structure of rifamycin S as quinoid surpasses in accuracy any alternative description and cannot be ignored.

Plaintiff's argument from legislative history is similarly limited by the interpretation placed on headnote 3 by the court. To the extent headnote 3 was intended to save from "benzenoid" classification those products which would not have been classified under the so-called "coal tar provisions" of the Tariff Act of 1930, it performs that function only for products whose benzenoid structure is derived in an intact manner from the precursor material and not for those whose structure is synthetically created from an intermediate product even though it is a restoration of the original structure.

In sum, the court agrees with the defendant's position that if, in the production of a cyclic organic chemical product, the original natural benzenoid structure is modified to become a quinoid structure the later reversion to benzenoid structure is a synthesis. That product is not entitled to the exclusionary effect of headnote 3 which is limited to products whose relevant structures have remained intact from the time of their first natural occurrence.

Judgment will be entered accordingly.

(C.D. 4714)

CRABTREE VICKERS, INC. *v.* UNITED STATES

Memorandum to Accompany Order Denying Motion for Rehearing

Court No. 75-1-00278

Port of New York

[Plaintiff's motion for rehearing of C.D. 4707 denied.]

(Dated September 23, 1977)

Murray Sklaroff for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Susan Handler-Menahem*, trial attorney), for the defendant.

LANDIS, Judge: Plaintiff has filed a motion for rehearing of *Crabn tree Vickers, Inc.* v. *United States*, 79 Cust. Ct. 13, C.D. 4707 (1977) on the sole basis set out in plaintiff's memorandum "that the Court did not rule expressly on the effect of General Interpretative Rule 10(h) pertaining to classification of articles *whether finished or not finished.*" (Emphasis quoted.)

As pointed out in defendant's brief in opposition to plaintiff's motion for rehearing, plaintiff's original brief, although it quoted both paragraphs (h) and (ij) of General Interpretative Rule 10, did not discuss either one. In plaintiff's second brief (opposing defendant's motion for summary judgment), plaintiff merely stated in its conclusion that General Interpretative Rule 10(h) permits classification under the claimed provision, again without discussing any basis therefor.

As counsel failed to sufficiently present this issue for determination previously, there ordinarily would be no ground for rehearing. *Lunham* v. *United States*, 1 Ct. Cust. Appls. 320, T.D. 31409 (1911). *Commonwealth Oil Refining Company, Inc.* v. *United States*, 60 CCPA 162, 166, 480 F. 2d 1352, 1355 (1973).

However, aside from this procedural difficulty there is no merit in plaintiff's contention, for the first time on rehearing, that General Interpretative Rule 10(h) * "supersedes *any legislative ratification* [emphasis quoted] for the simple reason that such proscriptions for classification of unfinished articles must appear in the context of the provision and not solely by way of judicial construction of legislative intent." No authority has been cited for plaintiff's novel position which would have the effect of nullifying judicial construction of legislative intent. The court of appeals stated in *United States* v. *J. Gerber & Co., Inc.. et al.*, 58 CCPA 110, 115, C.A.D. 1013, 436

* This rule appears in footnote 4, page 4, of original decision.

F.2d 1390, 1394 (1971), *aff'g J. Gerber & Co., Inc., et al.* v. *United States*, 62 Cust. Ct. 368, C.D. 3773, 298 F. Supp. 516:

> We agree with the trial court that the phrase in General Interpretative Rule 10(h) "unless the context requires otherwise" is meant to withdraw the Rule from operation wherever classification of an unfinished article under the provision for the completed article would come into conflict with any express declarations of Congress elsewhere set forth, that require otherwise. * * *

Clearly the words of Congress, "engraved or otherwise prepared for printing," describe the degree of completion or finishing necessary for merchandise to be classifiable within item 668.38, and legislative ratification of the judicial interpretation of those words indicates that rule 10 (h) is not relevant to this provision.

It is also apparent that the imported merchandise in this case cannot be considered to be an unfinished article for the purposes of TSUS item 668.38. Parts of an article may not be classified as the finished article if an essential item is missing. See *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, 6, C.A.D. 1109, 486 F.2d 1062, 1063 (1973). The instant plates, as has been held in *The Jersey City Printing Co. et al.* v. *United States*, 63 Treas. Dec. 397, T.D. 46219 (1933) and *J. E. Bernard & Co., Inc.* v. *United States*, 6 Cust. Ct. 46, C.D. 422 (1941), are not substantially complete as they are not engraved. A plate without any sort of engraving cannot be classified as an unfinished plate, engraved for printing, if it cannot produce an image.

The motion for rehearing is denied, and an order will be entered accordingly.

(C.D. 4715)

GREEN GIANT CO. *v.* UNITED STATES

American goods returned—
Lids for glass jars

AMERICAN GOODS RETURNED

Lids, alleged to be of American origin, which were returned on jars of imported mushrooms, are claimed to be entitled to free entry under the provisions of item 800.00 or 807.00 TSUS. *Held* for defendant.

SAME—JURISDICTION

A claim in protest alleging the dutiable value should be reduced by the value of the American-made lids is sufficient to inform customs officials of a claim under item 807.00 *supra*. *Chas. Kurz Co.* v. *United States*, 57 Cust. Ct. 84, C.D. 2734 (1966).

CUSTOMS REGULATIONS

Compliance with customs regulations relating to claims for free entry of American goods returned under item 800.00 or 807.00 *supra* is mandatory unless waived or plaintiff establishes impossibility of compliance. *Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937).

CUSTOMS REGULATIONS—WILLFUL NEGLIGENCE—FRAUDULENT INTENT

In order to qualify for the late filing of documents under Customs Regulation 10.112 plaintiff must affirmatively establish that its failure to comply was not due to willful negligence or fraudulent intent. *F. W. Myers & Co., Inc.* v. *United States*, 72 Cust. Ct. 133, C.D. 4515, 374 F. Supp. 1395 (1974); *F. W. Myers & Co., Inc.* v. *United States*, 70 Cust. Ct. 202, C.D. 4431, 360 F. Supp. 429 (1973), *appeal dismissed*, 61 CCPA 121 (1973); *E. Dillingham, Inc.* v. *United States*, 67 Cust. Ct. 226, C.D. 4278 (1971), *modified*, 60 CCPA 39, C.A.D. 1078, 470 F.2d 629 (1972).

SUPERVISORY COSTS

Costs of supervision which permeate the entire manufacturing process are dutiable as part of export value. *International Fashions* v. *United States*, 64 CCPA 35, 38, C.A.D. 1180, 545 F.2d 138, 140 (1976).

Court No. 73-9-02458

Ports of Milwaukee and Philadelphia

[Judgment for defendant.]

(Decided October 3, 1977)

Glad, Tuttle & White (*Edward N. Glad* and *T. Randolph Ferguson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis* and *Susan Handler-Menahem*, trial attorneys), for the defendant.

FORD, Judge: This action contests the appraisements by the Customs Service of four different sizes of mushroom packs in glass jars imported from the Republic of China (Taiwan) and entered at Milwaukee, Wisconsin and Philadelphia, Pennsylvania. Plaintiff claims the lids or caps on the mushroom jars were of American origin and therefore entitled to free entry by virtue of either item 800.00 or item 807.00 of the Tariff Schedules of the United States.

Plaintiff contends the appraised value of the merchandise should be reduced by an amount equal to the value of the allegedly American-made lids. Additionally, it is plaintiff's position that the dutiable value of the merchandise should not include the cost of certain supervision expenses which are alleged to have occurred after the mushrooms were packed.

The pertinent statutory provisions are as follows:

SCHEDULE 8. – SPECIAL CLASSIFICATION PROVISIONS

Part 1. – Articles Exported and Returned

* * * * * * *

Subpart A. – Articles Not Advanced or Improved Abroad

* * * * * * *

800.00	Products of the United States when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad	Free

* * * * * * *

Subpart B. – Articles Advanced or Improved Abroad

* * * * * * *

807.00	Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting	A duty upon the full value of the imported article, less the cost or value of such products of the United States (see headnote 3 of this subpart)

Initially, defendant contends this court lacks jurisdiction to review plaintiff's claims under items 800.00 and 807.00 since these are classification provisions and plaintiff's protests are directed solely to ap-

praisement of the merchandise.[1] The mere fact that items contained in TSUS, schedule 8, are referred to as "Special Classification Provisions" does not limit the provisions in schedule 8 to classification. Not all provisions of schedule 8 are directly concerned with the classification and rate of duty of imported merchandise. Items 806.20, 806.30 and 807.00 *supra*, by the very nature of the language utilized therein, relate directly to valuation of merchandise claimed to be entitled to treatment as American goods returned. The crucial determination which the court must make is whether the primary function served by the item numbers of schedule 8 in question is to set the rate of duty of the imported merchandise, or to define the method for ascertaining its dutiable value. If the latter function predominates, a protest against the customs official's appraisement decision is sufficient to confer jurisdiction over the schedule 8 claim upon this court.

Applying the preceding analysis to the facts in the case at bar, the court finds that item 807.00, by its terms, sets forth the procedure for ascertaining the dutiable value of imported goods containing American-made components. Therefore, a protest against the customs official's appraisement decision confers jurisdiction upon this court over the plaintiff's item 807.00 claim.

Item 807.00 does not attempt to establish the rate of duty for merchandise subject to its provisions. In the instant case the classification of the merchandise, which prescribes the rate of duty, is governed by item 144.20 TSUS. Item 807.00 specifically sets forth the method for determining dutiable value by providing for the imposition of:

> A duty upon the full *value* of the imported article, less the *cost or value* of such products of the United States. [Emphasis added.]

The applicability of item 807.00 *supra* to the instant case is further evidenced by headnote 3(b) of schedule 8, part 1, subpart B, which provides as follows:

> 3. Articles assembled abroad with components produced in the United States.—The following provisions apply only to item 807.00:
>
> * * * * * * *
>
> (b) The duty on the imported article shall be at the rate which would apply to the imported article itself, as an entirety *without constructive separation* of its components, in its condition as imported if it were not within the purview of this subpart. If the imported article is subject to a specific or compound rate of duty, the total duties shall be reduced in such proportion as the *cost or value* of such products of the United States bears to the *full value* of the imported article. [Emphasis added.]

[1] Under 28 U.S.C. § 2632(d), if the plaintiff contests solely the customs official's decision in appraising the value of the imported articles, it may not thereafter raise questions dealing with the classification and rate of duty in its complaint, or at trial. *E.g., C. L. Hutchins & Co., Inc., et al. v. United States*, 67 Cust. Ct. 60 C.D. 4252, 331 F. Supp. 318 (1971).

In each of the three protests filed concerning the instant merchandise, the basis of the dispute was stated as follows:

> As to the appraised value of said merchandise, it is claimed that the proper dutiable value is the entered value without the addition of the value of the American made lids * * *.

Though item 807.00 is not specifically mentioned, plaintiff's claim is precisely the type which would be raised under this item. As such, the protest was sufficient to inform customs of the nature of the plaintiff's item 807.00 claim. *Chas. Kurz Co.* v. *United States*, 57 Cust. Ct. 84, C.D. 2734 (1966).

With respect to the plaintiff's claim under item 800.00, it may be noted this item speaks in terms of entry free of duty, rather than of a reduction in dutiable value. It is unnecessary, however, for the court to resolve this question, for application of item 807.00 to the present case preempts reliance upon item 800.00.

Prior to the enactment of TSUS in 1963, no express tariff provision existed for imports containing American components. Under paragraph 1615(a) of the Tariff Act of 1930, as amended, which was identical to item 800.00 in all respects here relevant, American components in foreign articles were accorded free entry if they could be "constructively segregated" from the overall article without injury to themselves or the article as a whole. *C. J. Tower & Sons.* v *United States*, 33 Cust. Ct. 14, C.D. 1628 (1954). *See also* United States Tariff Commission, *Economic Factors Affecting the Use of Items 807.00 and 806.30 of the TSUS*, Report to the President on Investigation No. 332-61, at pp. 15-20 (TC Publication 339, Sept. 1970).

In the United States Tariff Commission's Tariff Classification Study of 1960, which accompanied the then proposed TSUS, the Commission criticized the constructive segregation doctrine as applied to foreign articles containing American components. The Commission stated:

> * * * [T]here is no logic to attributing the labor costs involved in assembly exclusively to foreign parts, nor is there any logic in holding that assembly operations do not advance or improve the component parts assembled therein. Such component parts reach their ultimate value only when they have been assembled into an article where they can in fact perform the function for which they were designed and made.
>
> The Bureau of Customs, in numerous rulings applying the principle of [*C. J. Tower & Sons* v. *United States*, *supra*] C.D. 1628, has allowed free entry to American-made components assembled into foreign articles if, "under the theory of constructive segregation," the components are "capable of being identified and removed without injury" to themselves or to the articles into which they have been assembled. * * *

> Whether or not an American component can be separated from a foreign article "without injury" to either is an unrealistic and arbitrary condition upon which to predicate partial exemption from duty.
>
> * * * * * * *
>
> In the circumstances, item 807.00 continues the substance of the practice but not under the theory that there has been no advancement or improvement. On the contrary, the provision and its related headnote (headnote 3 to subpart B) logically assume that there has been an advancement or improvement, but limits the extent of the advancement or improvement to that which is brought about solely by the act of assembly. * * * [Tariff Classification Study, Schedule 8, at pp. 13–15 (1960).]

The effect of item 807.00 has been "to solidify the demise of the 'constructive segregation' doctrine" in cases such as the one presently before the court. *United States* v. *Baylis Bros. Co.*, 59 CCPA 9, C.A.D. 1026, 451 F.2d 643 (1971). Item 807.00 makes unnecessary the constructive segregation of the American components contained in foreign merchandise, thus obviating the need to rely upon the fiction that these components were not advanced in value by means of assembly into the foreign article.

Defendant further contends the subject merchandise is ineligible for a reduction in dutiable value because plaintiff failed to comply with the applicable regulations of the Secretary of the Treasury for American goods returned. These regulations were promulgated pursuant to several express provisions of TSUS, notably general headnote 11, and headnote 1 to schedule 8, which provide:

> General Headnotes and Rules of Interpretation
>
> * * * * * * *
>
> 11. Issuance of Rules and Regulations. The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the schedules. The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide for total or partial relief from duty or other import restrictions on the basis of facts which are not determinable from an examination of the article itself in its condition as imported, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.
>
> *Schedule 8 headnote*:
>
> 1. The provisions of this schedule are not subject to the rule of relative specificity in headnote 10(c) of the General Headnotes and Rules of Interpretation, and, except as provided in headnote 3 to part 1 of this schedule, any article which is described in any provision in this schedule is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met.

Plaintiff does not contend that a physical examination of the subject merchandise should have indicated to the customs officials that the caps or lids were American made. Therefore, in order to procure free entry for the caps, it was incumbent upon the plaintiff to comply with all applicable regulations or establish that compliance has been waived or is impossible. *See, e.g. Maple Leaf Petroleum, Ltd.* v. *United States*, 25 CCPA 5, T.D. 48976 (1937).

Both parties apparently agree that the relevant regulations in effect at the time of the instant importations were found in 19 C.F.R. §10.1(a) (1971). This section provided in pertinent part:

ARTICLES EXPORTED AND RETURNED

§ 10.1 Domestic products; requirements on entry.

(a) *Except as otherwise provided for in this section* or in § 10.2, the following documents shall be filed in connection with the entry of articles claimed to be free of duty under schedule 8, part 1, Tariff Schedules of the United States:

(1) A declaration by the foreign shipper in substantially the following form, if the value of the returned articles exceeds $500:

* * * * * * *

(2) A declaration of the owner, importer, consignee, or agent on customs Form 3311.

(3) A certificate, customs Form 4467, of the collector of customs at the port from which the merchandise was exported * * *. [Emphasis added.]

This court is of the opinion, however, that the Secretary of the Treasury has "otherwise provided." A thorough review of 19 C.F.R. § 10.1 (1971) indicates that § 10.1(g), and not § 10.1(a), is the regulation with which the plaintiff had to comply in order to qualify for partially free entry under item 807.00. Section 10.1(g) provides as follows:

ARTICLES EXPORTED AND RETURNED

§ 10.1 Domestic products; requirements on entry.

* * * * * * *

(g) The following documents shall be filed in connection with the entry of articles claimed to be partially exempted from duty under item 807.00, Tariff Schedules of the United States, as amended:

(1) A declaration by the person who performed the assembling operations abroad, in substantially the following form:

I, _____, declare to the best of my knowledge and belief that the _____ were assembled in whole or in part from components, as listed and described below, which were produced in the United States.

List and description of components:

Marks or identification numbers	*Description of component*	*Quantity*

Unit value at time and place of export from United States	*Port and date of export from United States*

Description of operations performed abroad on the U.S. components including assembling and all other operations.

_____

_____

_____

_____ _____
(Date) (Signature)

_____
(Capacity)

_____
(Address)

(2) An endorsement of the owner, importer, consignee, or agent, in substantially the following form:

I declare to the best of my knowledge and belief that the (above) (attached) declaration of _____ is correct in every respect.

_____ _____
(Date) (Signature)

_____
(Capacity)

_____
(Address)

(3) If the customs officer concerned is reasonably satisfied because of the nature of the articles or production of other evidence, for example, pertinent business records or copies of shipper's export declarations, that the components are products assembled in such circumstances as to meet the requirements of item 807.00, he may waive the document provided for in subparagraphs (1) and (2) of this paragraph.

Prior to January 17, 1968, the parties' reliance upon section 10.1(a) of the regulations would have been appropriate, since the general requirements of this regulation were applied to all claims for free entry under part 1 of schedule 8, including item 807.00, until this date. However, on January 17, 1968, the Secretary of the Treasury promulgated regulation 10.1(g) to specifically set forth the docu-

mentary proof required for entry under item 807.00. 2 Cust. Bull. 53, T.D. 68–26, 33 F.R. 567 (1968). Substantiation of this position is contained in the United States Tariff Commission report entitled "Economic Factors Affecting the Use of Items 807.00 and 806.30 of the TSUS" *supra*, wherein the following comment was made:

> After the implementation of the TSUS in 1963, no specific regulations were issued with respect to the administration of the provisions of item 807.00. Rather, customs officers were informally advised to adapt section 10.1 of the Customs Regulations, relating to American goods returned without advancement in value. It was not until January 1968 that subsection (g) was added to section 10.1, specifically providing for the documentary proof to be filed in connection with the entry of articles containing U.S. fabricated components claimed to be exempt from duty under item 807.00.[2]

Plaintiff has not attempted to satisfy the document requirements of section 10.1(g). Compliance with the requirements was not waived by customs officials. Since compliance with all applicable regulations is mandatory, and an absolute precondition to recovery in this court, plaintiff's failure to satisfy section 10.1(g) bars its claim under item 807.00. *Maple Leaf Petroleum, Ltd.* v. *United States*, *supra*; *Mine Safety Appliances Company* v. *United States*, 36 Cust. Ct. 277, C.D. 1786 (1956).

Even if the court were to consider that compliance with section 10.1(a) of the regulations might constitute substantial compliance with section 10.1(g), I find such a position, especially with respect to the instant plaintiff, to be without merit.

The necessary documents under section 10.1(a), while containing much information which would be relevant under section 10.1(g), nowhere require a declaration of the person performing the assembly operations involving the American components describing the actual work done. This description enables the customs official to determine whether the terms of item 807.00 have been satisfied. It is the central, most important requirement contained in section 10.1(g). Since such a declaration is unnecessary under section 10.1(a) of the regulations, compliance with said section would not constitute substantial satisfaction of section 10.1(g).

Assuming arguendo that compliance with section 10.1(a) would suffice, the record clearly indicates plaintiff has not substantially complied with this section. None of the documents required by section 10.1(a) were filed either at the entry or the liquidation of the subject merchandise. Plaintiff's initial attempt at compliance occured when its counsel offered two sets of the documents, the shipper's declarations

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[2] This court's conclusion that 19 C.F.R. §10.1(g) (1971) is the regulation applicable to requests for item 807.00 treatment is further confirmed by developments in the customs regulations subsequent to the date of the instant importations. *Compare* 19 C.F.R. §10.1 (1976) *with* 19 C.F.R. §§10.11–10.24 (1976).

and customs 3311 forms, into evidence at the trial of this case.[3] It is urged by plaintiff that this constituted timely compliance with section 10.1(a) by virtue of the provisions of section 10.112 of the regulations, 19 C.F.R. §10.112 (1971), which provided:

> §10.112 Filing free entry documents after entry.
>
> Whenever a document, form, or statement required by regulations in this part to be filed in connection with the entry is not filed at the time of the entry or within the period for which a bond was filed for its production but failure to file it was not due to willful negligence or fraudulent intent, such document, form, or statement may be filed at any time prior to liquidation of the entry or, if the entry was liquidated, before the liquidation becomes final.

It is apparent that plaintiff misconceives the thrust of regulation 10.112 since it contends defendant has not demonstrated that the five-year delay in filing the two sets of documents was due to willful negligence or fraudulent intent and, therefore, submission at the trial was timely. Effective late filing of entry documents under this regulation is a privilege to which an importer becomes entitled only when the importer *affirmatively established* its failure to file in a timely manner was not due to willful negligence or fraudulent intent. *F. W. Myers & Co., Inc.* v. *United States*, 72 Cust. Ct. 133, C.D. 4515, 374 F. Supp. 1395 (1974); *F. W. Myers & Co., Inc.* v. *United States*, 70 Cust. Ct. 202, C.D. 4431, 360 F. Supp. 429 (1973), *appeal dismissed*, 61 CCPA 121 (1973); *E. Dillingham, Inc.* v. *United States*, 67 Cust. Ct. 226, C.D. 4278 (1971), *modified*, 60 CCPA 39, C.A.D. 1078, 470 F.2d 629 (1972). The burden of proof is on plaintiff, not the defendant.

Plaintiff's evidence was insufficient in this regard. None of the three witnesses who testified for plaintiff alluded to the fact that the documents were first proffered at trial, at least five years after the importations occurred. There was no evidence offered to explain the long delay. Under these circumstances, plaintiff may not take advantage of the late-filing privilege contained in regulation 10.112. Consequently, plaintiff has not complied with section 10.1(a) or 10.1(g) of the regulations. Based upon the record as made, plaintiff's claims under items 800.00 and 807.00 must, therefore, be dismissed.

The next issue for consideration is whether the dutiable value of the merchandise should be reduced by the value of certain supervision costs amounting to $0.05 per case of packed mushrooms. Plaintiff maintains these costs were incurred during "quality assurance" inspections of the merchandise after it had been completely manu-

[3] The plaintiff produced no certificates of exportation whatsoever. *See* 19 C.F.R. §10.1(a) (3) (1971). The plaintiff contends that it was relieved of the responsibility of filing these documents by virtue of the doctrine of impossibility. *See, e.g., United States* v. *Coastwise Steamship & Barge Co.*, 9 Ct. Cust. Appls. 216, T.D. 38047 (1919); *Nanco, Incorporated* v. *United States*, 40 Cust. Ct. 366, C.D. 2007 (1958). In light of the disposition of this case, it is unnecessary to address this contention.

factured by the Taiwanese packers and immediately prior to its actual shipment to the United States. Quality assurance, argues the plaintiff, is distinguishable from "quality control," which occurs during the manufacturing process, and is admittedly dutiable as a part of export value.

Defendant's main response to this contention is that the "separability rule" [4] precludes a reduction in the dutiable value of the merchandise. This court finds it unnecessary to consider the issue of separability as plaintiff has failed to establish that its supervision costs were incurred solely as an incident to a post-manufacture inspection of the merchandise.

Testifying for the plaintiff with respect to the invoiced supervision costs was Marshall Evans, presently the plaintiff's coordinator of international production, and from October 1969 until October 1970 the manager of plaintiff's Far East operations. Mr. Evans testified that "[s]upervision cost is an estimated cost of the operation [of Green Giant] in Taiwan * * *." (R. 68.) In commenting upon the nature of that operation, the witnesss explained:

> We maintain a Taipei office with a manager of Far East operations, with a manager and with a secretary. And we also maintain a quality control laboratory from which our assistants work for the specific work done at the plants. [R.69.]

Though Mr. Evans admitted the invoiced supervision costs were "estimated," he maintained they were for plaintiff's final inspection after manufacture was complete, and immediately before shipment. Mr. Evans' earlier testimony, however, clearly indicates plaintiff's inspection and other activities encompassed the entire manufacturing process. At one point, he stated:

> * * * one of the aspects in which we must operate is quality control. And we have specifications that have to be met. And we have our own people over there who do the inspecting *during processing* and after processing. * * * [R.33, emphasis supplied.]

During Evans' cross-examination, the following colloquy occurred (R.50):

> Q. You mentioned that you have representatives going to the factories of the various packers?—A. Yes.
> Q. How many times in a year did they go to these factories?—A. Well, two representatives rotated between ten factories.
> Q. You didn't answer my question. Let's take number one.

---

[4] Our appellate court in *United States* v. *H. M. Young Associates*, 62 CCPA 20, 23, C.A.D. 1138, 505 F. 2d 721, 724 (1974) restated the separability rule in appraisement cases as follows:

> If ex-factory prices and other charges are separately stated on the invoices and the appraiser's finding of value is expressed in terms of the invoice unit prices, plus the questioned charges, the appraisement is deemed to be separable. * * * Under the rule * * * a party to a reappraisement proceeding may challenge one or more of the elements entering into an appraisement, while relying upon the presumption of correctness of the appraiser's return as to all other elements, whenever the challenged items do not disturb the effect of the remainder of the appraisement. * * *

How many times a year did they go to these ten factories?—A. A year or during the pack?

Q. Would you explain the difference? What do you mean by "during the pack"?—A. *During the pack these people were continually, long days going to the ten different factories.* [Emphasis supplied.]

Q. What do you mean by during the pack?—A. About December 1st until April, until the month of April.

Q. That's when they [5] were actually, physically packing the mushrooms?—A. Yes.

This testimony establishes plaintiff's operation in Taiwan included significant "quality control" activity in addition to a final preshipment inspection. Plaintiff's employees or agents were present in the packing factories during the actual "manufacture" of the finished product in order to render technical assistance and other advice and control.

In *International Fashions* v. *United States*, 64 CCPA 35, —, C.A.D. 1180, 545 F.2d 138, 140 (1976), our appellate court held the costs of an inspection service which permeates the entire manufacturing process are dutiable as part of export value.

Plaintiff having failed to demonstrate which portion of its invoiced supervision costs was attributable to its final inspection, as opposed to inspection and control during the manufacturing process, has not sustained its burden of proof. The presumptively correct appraisements of the customs officials must therefore be sustained.

Judgment will be entered accordingly.

(C.D. 4716)

CORNING GLASS WORKS *v.* UNITED STATES

Ampul inspection machines

AMPUL INSPECTION MACHINES—MACHINES NOT SPECIALLY PROVIDED FOR (ITEM 678.50, TSUS)

Ampul inspection machines are properly dutiable under the provision in item 678.50, TSUS, for machines not specially provided for, as claimed by plaintiff, rather than under the provision in item 710.90, TSUS, for "Other" optical measuring or checking instruments and appliances, as classified by the Government. *Amaco, Inc.* v. *United States*, 74 Cust. Ct. 172, C.D. 4602 (1975); and *Bruce Duncan Co., Inc., a/c Staalkat of America, Inc.* v. *United States*, 67 Cust. Ct. 430, C.D. 4312 (1971), distinguished.

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[5] It is clear from the context in which it was used that the pronoun "they" in this sentence refers to the Taiwanese packers, and not to plaintiff's representatives at the factories.

DOCTRINE OF *STARE DECISIS*—INAPPLICABLE WHERE NEW ISSUE RAISED

Fundamentally, a decision in a prior case involving the same merchandise and issue is ordinarily *stare decisis* of the succeeding case. *Manca, Inc.* v. *United States*, 47 CCPA 103, C.A.D. 738 (1960); *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, C.A.D. 737 (1960); *B. Axelrod & Co.* v. *United States*, 70 Cust. Ct. 117, C.D. 4417 (1973). However, the doctrine of *stare decisis* is inapplicable where, as in the present case, a new issue is raised. *Neumann-Endler, Inc.* v. *United States*, 27 CCPA 53, C.A.D. 61 (1939); *Rico Import Co.* v. *United States*, 65 Cust. Ct. 554, C.D. 4138 (1970).

STATUTORY CONSTRUCTION—DOCTRINE OF *EJUSDEM GENERIS*

The doctrine of *ejusdem generis* is ordinarily applied to limit provisions in which general words follow a specific enumeration of articles. *United States* v. *Ampex Corp.*, 59 CCPA 134, 137, C.A.D. 1054, 460 F. 2d 1086, 1087 (1972). In determining whether a particular article is included within the general words of the statute, "the courts have looked to the enumerated articles to ascertain the characteristics which they possess in common". *Kotake Co., Ltd. et al.* v. *United States*, 58 Cust. Ct. 196, 199, C.D. 2934, 266 F. Supp. 385, 387–88 (1967).

STATUTORY CONSTRUCTION—READING PROVISIONS TOGETHER

Inferior headings or item numbers appearing below a superior heading must be construed with reference to each other, and with reference to the superior heading—viz., construed as a whole. Hence, the scope of the merchandise embraced by item 710.90, TSUS, is ascertainable only with reference to the preceding inferior headings (items 710.86 and 710.88) and the superior heading.

"OTHER" OPTICAL MEASURING OR CHECKING INSTRUMENTS (ITEM 710.90, TSUS)—LEGISLATIVE HISTORY—*EJUSDEM GENERIS*

The legislative history of items 710.86 through 710.90, TSUS, and the doctrine of *ejusdem generis* establish that the optical measuring or checking instruments and appliances embraced by item 710.90 must either measure or check for the correctness of measure. Accordingly, ampul inspection machines which are used by pharmaceutical manufacturers to inspect containers for the presence of particulate matter, missing labels and "chars", but do not measure or check for the correctness of measure, are not within the scope of the residual provision for "Other" optical measuring or checking instruments and appliances in item 710.90, TSUS.

BURDEN OF PROOF—GOVERNMENT'S CLASSIFICATION ERRONEOUS

It is fundamental that notwithstanding the Government's classification has been shown to be erroneous, plaintiff had the burden of establishing the correct classification. See Sturm, *A Manual of Customs Law* (1974), p.383.

Court No. 75-8-02008

Port of New York

[Judgment for plaintiff.]

(Decided October 4, 1977)

Murray Sklaroff for the plaintiff.

Barbara Allen Babcock. Assistant Attorney General (*John J. Mahon*, trial attorney), for the defendant.

NEWMAN, Judge: This action concerns the proper tariff classification for certain "Rota" ampul inspection machines imported from West Germany and entered at the port of New York in December 1973 and June 1974. The machines in question are used by pharmaceutical manufacturers to inspect sealed glass containers (ampuls or vials) filled with injectable drugs.

The Rota machines were classified by the regional commissioner of customs as "Optical measuring or checking instruments and appliances not provided for elsewhere in subpart C, D, or F of this part [part 2, schedule 7], and parts thereof: * * * Other", under item 710.90, TSUS, as modified by T.D. 68-9, and assessed with duty in liquidation at the rate of 25 per centum ad valorem.

Plaintiff asserts that the Government's classification is erroneous, and advances four alternative claims:

(1) Item 678.50, TSUS, as modified, *supra*, providing for "Machines not specially provided for", at the rate of 5 per centum ad valorem;

(2) Item 662.20, TSUS, as modified, *supra*, providing for parts of "machinery for filling, closing, sealing, capsuling, or labelling bottles, cans, boxes, bags, or other containers", at the rate of 5.5 per centum ad valorem;

(3) Item 708.85, TSUS, as modified, *supra*, covering "Hand magnifiers, magnifying glasses * * * and similar articles", at the rate of 12.5 per centum ad valorem; and

(4) Item 708.91, TSUS, as modified, *supra*, covering frames and mountings for the articles provided for in item 708.85, at the rate of 15 per centum ad valorem.

I have concluded that the merchandise was erroneously classified by the customs officials under item 710.90, TSUS, and plaintiff's claim under item 678.50, TSUS, should be sustained.

THE STATUTE

The pertinent provisions of the TSUS read as follows:

Tariff Schedules of the United States:

SCHEDULE 6. – METALS AND METAL PRODUCTS

* * * * * * *

PART 4. – MACHINERY AND MECHANICAL EQUIPMENT

* * * * * * *

Subpart A. – Boilers, Non-Electric Motors and Engines and Other General-Purpose Machinery

* * * * * * *

Machinery for cleaning or drying bottles or other containers; machinery for filling, closing, sealing, capsuling, or labelling bottles, cans, boxes, bags, or other containers; * * * all the foregoing and parts thereof:

* * * * * * *

662.20 Other ..... 5.5% ad val.

* * * * * * *

Subpart H.–Other Machines

* * * * * * *

678.50 Machines not specially provided for, and parts thereof ..... 5% ad val.

* * * * * * *

SCHEDULE 7. – SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

* * * * * * *

PART 2. – OPTICAL GOODS; SCIENTIFIC AND PROFESSIONAL INSTRUMENTS; WATCHES, CLOCKS, AND TIMING DEVICES; PHOTOGRAPHIC GOODS; MOTION PICTURES; RECORDINGS AND RECORDING MEDIA

Part 2 headnotes:

* * * * * * *

3. The term "optical instruments", as used in this part, embraces only instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

* * * * * * *

Subpart A. – Optical Elements, Spectacles, Microscopes, and Telescopes, Optical Goods Not Elsewhere Provided For

* * * * * * *

Optical appliances and instruments not provided for elsewhere in part 2 of this

	schedule; frames and mountings for such articles, and parts of such frames and mountings:	
708.85	Hand magnifiers, magnifying glasses, loupes, thread counters and similar articles	12.5% ad val.
	* * * * * * *	
	Frames and mountings and parts thereof:	
	* * * * * * *	
708.91	For articles provided for in item 708.85	15% ad val.
	* * * * * * *	
Subpart C.	– Surveying, Navigational Meteorological, Drawing, and Mathematical Calculating Instruments; Measuring and Checking Instruments Not Specially Provided For	
	* * * * * * *	
	Optical measuring or checking instruments and appliances not provided for elsewhere in subpart C, D, or F of this part, and parts thereof:	
710.86	Profile projectors and parts thereof	* * *
710.88	Comparator benches, measuring benches, and micrometric reading apparatus, all the foregoing and parts thereof	* * *
710.90	Other	25% ad val.

The Record [1]

The subject importations, "Rota" inspection machines, are used by pharmaceutical manufacturers for the inspection of filled and sealed ampuls containing injectable drugs. Such ampuls are inspected for the purpose of detecting any contamination by visible foreign particulate matter (lint, insect parts, glass particles, etc.), chars (discoloration of the drug caused by exposure to excessive heat during the sealing of the ampul) and missing labels.

Pharmaceutical manufacturers most commonly inspect filled and sealed ampuls manually. In such manual method, the inspector holds several ampuls in her hand, shakes them to get the contents in motion, and then holds the containers up against a suitable background under

[1] The record comprises the oral testimony of one witness for plaintiff and two witnesses for defendant. Plaintiff's witness was David S. Berg, plant manager of the Hodes-Lange plant of Corning Glass Works, North Bergen, New Jersey. Hodes-Lange is the North American agent for the Rota Company, the West German manufacturer of the imported machines. Defendant's witnesses were: Eugene E. Lakso, president of the Lakso Company, Leominster, Massachusetts; and Eugene J. Kovary, senior supervisor of pharmaceutical engineering for Hoffman La Roche, Inc., Nutley, New Jersey. The record also includes various exhibits offered by the parties, and the official papers which were offered by plaintiff.

appropriate lighting. The inspector looks for foreign matter, presence of a leak (as indicated by a dye) and "she may be checking the printing" (R.24).

Several different machines are available that mechanize the inspection process, "and they serve primarily to hasten it" (R. 24). The Rota machines, while accomplishing the same end result as a simple manual inspection, mechanize the inspection process, thereby increasing the efficiency and productivity of the inspector. Hence, the Rota machines mechanically convey ampuls or similar containers into the inspector's field of vision, at which point they are held there by vacuum chucks and rotated rapidly in order to set the contents in motion. After a brief high speed rotation the motion is stopped, and the contents of the ampul continue swirling around while the operator inspects the ampuls. The purpose of spinning the containers is to make any particulate matter mobile, and thus more readily visible. If an ampul appears defective, the operator may reject it by depressing a button activating a jet of compressed air that blows the defective ampul off the stage. Ampuls that pass inspection are accumulated in a chute at the discharge end of the machine, so that they can be scooped back into a magazine or tray similar to the one in which they were placed originally for conveyance to the operator. The Rota machine has the capacity to handle 3,000 containers per hour, and counts the pieces inspected.

The Rota machine *per se* does not inspect ampuls or containers, but merely aids in the inspection process, which is accomplished by human vision.[2] To aid the inspector's vision, the Rota incorporates a magnifying lens having approximately a 200 percent magnification,[3] through which the ampuls are viewed on an illuminated stage with various backgrounds.[4] The purpose of the magnifying lens was explained by plaintiff's witness, as follows (R. 30):

> * * * [W]e view these [Rota] machines primarily as pacing devices—as machines which mechanize the inspection function and pace it. To do that takes quite a bit of mechanism, and the inspector's head is located about 22 to 24 inches away from the point where the containers are on the stage. From that distance, without the lens, you would not be able to see the detail necessary to do the job. So, the lens is introduced to make the containers appear about the way they would appear if you were looking at them close up in your hand.

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[2] Ampul inspection can be accomplished without human vision by a completely electronic machine (like the "Autoscan" produced by the Lakso Company—see defendant's exhibit B), that utilizes a combination of light and a television camera (R. 87-88).

[3] A 300 percent magnifying lens was also included in the importations as an accessory to be used in lieu of the 200 percent lens (R. 35-36). However, the 300 percent magnifying lens was discarded in use because it caused too much distortion (R. 40).

[4] Additionally, the Rota machine "has the capability of introducing a polarizing screen in between the containers and the inspector, so that the inspector is viewing the containers in polarized light * * *" (R. 55).

Consequently, the lens serves to magnify the ampul under inspection so that it appears to be the same size as though the inspector were able to view the container at the normal reading distance of ten inches, which is not possible with the Rota machine (R. 33–34). Additionally, the viewing area of the Rota machine is hooded to shield out extraneous light and to avoid distraction to the inspector.

In order to properly perform its ampul inspection purpose, the Rota's conveying, spinning and rejection functions are all essential, as is the magnifying lens feature.

The Rota machines are limited in their purpose to aid inspection. They do not fill or seal ampuls, and are not required for any other machine's operation. Plaintiff does not advertise or otherwise represent that the Rota is *part* of any other machine, or *part* of any integrated or coordinated system of filling or sealing "machinery". Filling and sealing of ampuls in pharmaceutical plants are performed in areas known as "sterile" or "clean rooms", in which no other machinery is present. After filling and sealing, ampuls are sterilized and dye-tested for defects in autoclaves. After autoclaving, the ampuls may remain stored for various periods of time before inspection.

None of the witnesses considered that the Rota machines were similar to hand-held magnifying glasses or frames or mountings for magnifying glasses (R. 77–78, 99, 124).

Opinion

At the outset, it is to be observed that in *Amaco, Inc.* v. *United States*, 74 Cust. Ct. 172, C.D. 4602 (1975), a "Strunck" ampul inspection unit, functionally similar to the Rota machines involved herein (R. 97, 98, 119), was before the court. The Strunck unit was classified by the customs officials under item 710.90, TSUS, and was claimed by plaintiff to be properly classifiable under item 678.50, TSUS. Plaintiff *conceded* that the inspection performed by the Strunck unit is a "checking" function, and the sole issue joined and briefed by the parties was whether the machine was an "optical instrument". Noting plaintiff's concession, and relying upon the statutory definition of "optical instrument" in headnote 3 of part 2, schedule 7, TSUS, the court held that the Strunck ampul inspection unit was properly classified by the Government under item 710.90.

In addition to noting plaintiff's concession in *Amaco* concerning the "checking" function of the Strunck unit, the court cited *Bruce Duncan Co., Inc., a/c Staalkat of America, Inc.* v. *United States*, 67 Cust. Ct. 430, C.D. 4312 (1971). There, the court held that the "candling" or grading function performed by an egg handling machine, which function involved an internal inspection of eggs under a light

source for the purpose of detecting discoloration and other imperfections, constituted "checking" within the purview of the superior heading to items 710.60 through 710.80, TSUS, covering *inter alia* "non-optical measuring or checking instruments, apparatus, and machines not specially provided for".

Defendant contends that *Amaco* is *stare decisis* in the present case. Fundamentally, of course, a decision in a prior case involving the same merchandise and the same issue is ordinarily *stare decisis* of the succeeding case. *Manca, Inc.* v. *United States*, 47 CCPA 103, C.A.D. 738 (1960); *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, C.A.D. 737 (1960); *B. Axelrod & Co.* v. *United States*, 70 Cust. Ct. 117, C.D. 4417 (1973).

Plaintiff, however, correctly insists that *Amaco* is not dispositive here, since unlike the prior case, plaintiff—relying upon the doctrine of *ejusdem generis*—does not concede, but rather disputes, that the Rota inspection machines perform a "checking" function within the meaning of that term in the statute. Significantly, there is no indication in either the *Amaco* or *Bruce Duncan* decision that the legislative history of items 710.86 through 710.90, TSUS, or the rule of *ejusdem generis*—urged by plaintiff here—was submitted to, or considered by the court in connection with construing the term "checking". It will bear repetition to state, again, that the sole issue joined and briefed by the parties in *Amaco* was whether the Strunck machine was an "optical instrument". And indeed, in *Bruce Duncan* the provisions of items 710.86 through 710.90 were not involved in that case, but rather the superior heading to items 710.60 through 710.80.

Plainly, the doctrine of *stare decisis* is inapplicable where, as in the present case, a new issue is raised. *Neumann-Endler, Inc.* v. *United States*, 27 CCPA 53, C.A.D. 61 (1939); *Rico Import Co.* v. *United States*, 65 Cust. Ct. 554, C.D. 4138, 320 F. Supp. 989 (1970), *aff'd*, 60 CCPA 15, C.A.D. 1075, 469 F.2d 699 (1972).

Judge Re (now Chief Judge of this Court), in an address delivered at a Seminar for Federal Appellate Judges, entitled *Stare Decisis and the Judicial Process*, published in 22 The Catholic Lawyer 38 (1976), cited Black's *Law of Judicial Precedents*. Judge Re stressed that Black "highlighted the importance of the issues presented in the prior case", and went on to quote from Black (at 39–40):

> A decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given.

Inasmuch as the present case involves a controversy concerning the term "checking" and the applicability thereto of *ejusdem generis*, which issue was not before the court in *Amaco*, I am clear that the prior case is not dispositive by virtue of the *stare decisis* doctrine. Moreover, since the term "checking" has several possible interpretations,[5] the intent of Congress as it may be gleaned from the legislative history is appropriate for consideration.

Before addressing the applicability of the *ejusdem generis* doctrine to the construction of the term "checking", we shall consider the legislative history of items 710.86 through 710.90, TSUS.

In the *Tariff Classification Study Explanatory and Background Materials* (November 15, 1960), Schedule 7, page 150, the drafters of the tariff schedules set forth the intended scope of items 710.86 through 710.90, TSUS:[6]

> Item 710.86 through 710.90—The third superior heading in this subpart would provide for "optical measuring or checking instruments and appliances not provided for elsewhere in subpart C, D, or F of this part". These three items (which were included in subpart D of this part in the draft published for public hearings) embrace a number of optical instruments used for measuring and checking materials and products, in laboratories, machine shops, inspection stations and the like. Such instruments would include profile projectors used for checking the shape and dimensions of machined articles, optical comparators, comparator and measuring benches, interferometers, optical surface testers, alignment telescopes, micrometric reading apparatus and *similar instruments*. The instruments included in these categories all incorporate optical devices of various types, but instruments whose only optical element consists of a magnifying device for reading scales or for carrying out adjustments are not included (see headnote 3 of this part). * * * [Emphasis added.]

Similarly, the *Summaries of Trade and Tariff Information* (1970), Schedule 7, Vol. 2, p. 155, describe the merchandise covered by items 710.86 through 710.90, TSUS, as follows:[7]

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[5] See *Webster's Third New International Dictionary* (Unabridged), 1966, p. 381.

[6] This study was submitted by the Tariff Commission to Congress prior to the effective date of the TSUS, and is regarded by the courts as an authoritative source for determining legislative intent. See, e.g.: *Certified Blood Donor Services, Inc.* v. *United States*, 62 CCPA 66, C.A.D. 1147, 511 F. 2d 572 (1975); *Kurt S. Adler, Inc.* v. *United States*, 61 CCPA 68, C.A.D. 1122, 496 F. 2d 1220 (1974); *Albert E. Price, Inc.* v. *United States*, 60 CCPA 127, C.A.D. 1095, 476 F.2d 1354 (1973); *Wayne Withrow Conrac Division* v. *United States*, 60 CCPA 144, C.A.D. 1101, 477 F. 2d 1393 (1973); *Rifkin Textiles Corp.* v. *United States*, 54 CCPA 138, C.A.D. 925 (1967), *cert. denied*, 389 U.S. 931 (1967).

[7] The *Summaries of Trade and Tariff Information* have been referred to by our appellate court as an aid in determining the scope of tariff provisions. See, e.g., *American Bristle & Hair Drawing Co., Keer Maurer & Co.* v. *United States*, 59 CCPA 104, 108, C.A.D. 1048, 458 F. 2d 524, 527 (1972); *Tanross Supply Co., Inc.* v. *United States*, 58 CCPA 26, 31, C.A.D. 1000, 433 F. 2d 1332, 1336 (1970). See also *Lyons Export & Import, Inc.* v. *United States*, 59 CCPA 142, 144, C.A.D. 1056, 461 F. 2d 830, 831 (1972); *Oxford International Corporation* v. *United States*, 75 Cust. Ct. 58, 66-67, C.D. 4608 (1975).

Description and uses

The optical instruments discussed herein are used for measuring and checking materials and products in laboratories, machine shops, and inspection stations, and for similar technical requirements.

Item 710.86 includes: (1) profile projectors, used for checking the shape and dimensions of a wide variety of objects (pieces cut to shape, gears and pinions for small-sized mechanisms, screws, screw-taps, chasers, etc.) or for examining surfaces; and (2) optical or graduated scale comparators, for checking the dimensions of a part being manufactured against a standard piece; and parts thereof.

Item 710.88 includes: (1) comparator benches for checking elongation, lengths, surfaces, etc., (2) measuring benches for large parts, thread gauges, gear cutters, threaded shafts for lathes, cross members, etc., and (3) micrometer reading apparatus for checking movement of tables of machine tools; and similar instruments, and parts thereof.

Item 710.90 includes: (1) optical surface testers for gauging the condition of surfaces by means of a combination of a prism and a lens, (2) alignment telescopes for checking straightness of benches and machine slides and measuring metallic constructions, (3) optical goniometers or angle gauges for checking sharpening angles of teeth or blades during sharpening; and (4) other optical measuring or checking instruments, and parts thereof.

See also the *Explanatory Notes to the Brussels Nomenclature*, Vol. III, Section XVIII, Heading 90.16, which describe the optical measuring and checking instruments mentioned in the *Tariff Classification Study*.

As may be seen above, the *Tariff Classification Study* enumerates specific optical measuring and checking instruments intended to be covered by items 710.86 through 710.90, and further states that "similar instruments" are also included. As shown by the *Summaries of Trade and Tariff Information* and *Explanatory Notes to the Brussels Nomenclature*, the articles specifically enumerated above in the *Tariff Classification Study* are all used for either measuring or checking the correctness of some form of measurement. Consequently, the *similar instruments* mentioned must have one or both of these uses. Admittedly, the Rota machines are used to "check" ampuls for the presence of particulate matter, "chars" and missing labels, and not for the correctness of any form of measurement. Hence, I conclude that the Rota machines are not one of the "similar instruments" which Congress intended should fall within the purview of item 710.90, TSUS.

Turning now to the issue of *ejusdem generis*, our Appellate Court has observed that "the rule is ordinarily applied to *limit* provisions in which general words follow a specific enumeration of articles". [Emphasis added.] *United States* v. *Ampex Corp.*, 59 CCPA 134,

137, C.A.D. 1054, 460 F. 2d 1086, 1087 (1972). Parenthetically and interestingly, a forerunner resembling the *ejusdem generis* doctrine is enunciated in the Sifra and the Commentary on Leviticus as one of the thirteen exegetical principles of logic by which The Law is expounded and interpreted by the sages.[6]

Relying heavily upon the rule of *ejusdem generis*, plaintiff argues that the articles named in items 710.86 and 710.88, TSUS, all either measure or check the correctness of measure, and that by virtue of the rule, an article to be classifiable under the general provision for "Other" in item 710.90, TSUS, must likewise either measure or check the correctness of measure.

In a word, I find merit in the plaintiff's position. On the basis of the very reasons indicated *supra* for concluding that the Rota machines are not one of the "similar instruments" referred to in the *Tariff Classification Study*, I also find that the machines are not *ejusdem generis* with the articles specifically enumerated in items 710.86 and 710.88, TSUS, as claimed by plaintiff.

In determining whether a particular article is included within the general words of the statute, "the courts have looked to the enumerated articles to ascertain the characteristics which they possess in common". *Kotake Co., Ltd. et al.* v. *United States*, 58 Cust. Ct. 196, 199, C.D. 2934, 266 F. Supp. 385, 387–88 (1967).

Thus, in *Merck & Co. (Inc.)* v. *United States*, 19 CCPA 16, T.D. 44852 (1931), it was held that in view of the legislative history and the rule of *ejusdem generis*, the provision for "other saccharides" in paragraph 504 of the Tariff Act of 1922 covering named products which were, for the most part, rare and expensive saccharides used for bacteriological testing and medicinal diagnosis, was not applicable to sugar of milk, a saccharide product which was inexpensive and commonly used commercially in infant food. Hence, the appellate court *restricted* the residual provision for "other saccharides" to saccharides of like character, material and use to those specifically named in the paragraph.

Further, in *European Trading Co.* v. *United States*, 19 CCPA 82, 86–87, T.D. 45225 (1931), our appellate court decided that in determining whether certain wire netting used for holding stucco in the sides of buildings was within the scope of the provision in paragraph 312 of the Tariff Act of 1922 for "all other structural shapes", it was "eminently proper to consider the question as to whether the articles sought to be included within its terms are of the same kind, class or nature as the articles specifically named in the paragraph * * *".

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[6] See Hertz, *Daily Prayer Book With Commentary* (Bloch Publishing Co., rev. ed. 1948), p. 43; and Birnbaum, *High Holyday Prayer Book* (Hebrew Publishing Co., 1951), pp. 84–88.

And in *Oxford International Corporation* v. *United States*, 75 Cust. Ct. 58, C.D. 4608 (1975), applying the doctrine of *ejusdem generis*, the court held that taillights for bicycles do not fall within a provision for "other sound or visual signalling apparatus" following an enumeration for "Bells, sirens, indicator panels, burglar and fire alarms" in item 685.70, TSUS, since all of the named devices are activated or function in temporary or abnormal situations only, while taillights operate continuously, and do not warn of the existence of emergencies or special circumstances. For other cases applying the doctrine of *ejusdem generis* see also: *Mego Corp.* v. *United States*, 62 CCPA 14, C.A.D. 1137, 505 F. 2d 1288 (1974) (miniature pinball article held not to be within the provision for "other games played on boards of special design"); *Wells, Fargo & Co.* v. *United States*, 8 Ct. Cust. Appls. 125, T.D. 37266 (1917) ("Other mechanical process").

Defendant insists that "[i]rrespective of whether or not all of the articles provided for in items 710.86 and 710.88, TSUS, do measure or check the correctness of measure, the doctrine of *ejusdem generis* has no application * * * [in this case]". Continuing, defendant urges that the rule is inapplicable here because there are three different tariff provisions under the superior heading to items 710.86 through 710.90, and this is not a case where a class of articles is provided for *after* certain members of the class have been enumerated.[9] I am unable to agree with the analysis of the statute by able counsel for the defendant.

Inferior headings or item numbers appearing below a superior heading must be construed with reference to each other, and with reference to the superior heading—viz., construed as a whole.[10] Obviously, the residual or "basket" provision "Other" in item 710.90, standing isolated from the preceding inferior provisions (items 710.86 and 710.88) and the superior heading, is totally meaningless. Plainly, then, the scope of the merchandise embraced by item 710.90 is ascertainable only with reference to its superior heading and the preceding items, 710.86 and 710.88, TSUS.[11] Accordingly, reading the pertinent statutory provisions as a whole, items 710.86 and 710.88 cover enumerated optical measuring or checking instruments and appliances at certain rates of duty; and a residual class "Other" (optical measuring or checking instruments and appliances) is covered at a separate rate

[9] Defendant states in its brief that the "*superior heading* [preceding items 710.86 and 710.88, TSUS] contains the *general terms* of the class of articles, 'optical measuring and checking instruments and appliances * * * and parts thereof', while the inferior provisions, items 710.86 and 710.88, TSUS, contain *particular descriptions* of articles, with item 710.90, TSUS, providing for *all* other optical measuring and checking instruments and appliances, not specially provided for elsewhere". (Emphasis by defendant.)

[10] For example, General Interpretative Rule 10(c)(i) provides: "(i) A superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;"

[11] Since the superior heading to items 710.86 through 710.90 expressly excludes optical measuring or checking instruments and appliances provided for in subparts C, D and F of part 2, schedule 7, it is apparent that the superior and inferior headings must also be construed in conjunction with pertinent provisions in subparts C, D and F.

of duty in item 710.90. Inasmuch as the general class of articles covered by item 710.90 *follows* the specifically enumerated articles in items 710.86 and 710.88, the doctrine of *ejusdem generis* is clearly apposite.

The short of the matter is that in view of the legislative history referred to herein and the doctrine of *ejusdem generis*, the court disagrees with the defendant that the *Amaco* decision is *stare decisis*, and finds that the Rota machines were erroneously classified by the Government under item 710.90, TSUS. Consequently, it is unnecessary to reach the vigorously disputed question of whether the magnifying lens incorporated in the Rota brings the machines within the definition of "optical instruments" in headnote 3 of part 2, schedule 7. This court, of course, has noted that such question was decided favorably to defendant in connection with the Strunck machine in *Amaco*.

It is fundamental that notwithstanding the Government's classification has been shown to be erroneous,[12] plaintiff had the burden of establishing the correct classification. See Sturm, *A Manual of Customs Law* (1974), p. 383. As previously stated, plaintiff makes four alternative claims. I have carefully considered these claims, and find that all except item 678.50, TSUS, are without merit.

In support of its claim under item 662.20, TSUS, plaintiff contends that inspection is the last step in the ampul filling and sealing operation, and therefore the Rota machine is "part of an aggregate of means to produce a filled, sealed ampul". The record, however, fails to sustain that contention.

Indeed the evidence clearly shows that the Rota machines have no role in sealing or filling ampuls, nor are Rotas even used in the same area with machinery utilized for filling and sealing ampuls (R.65–66, 97). The record further shows that ampuls which are filled and sealed are subjected to autoclaving before they are inspected (R.68, 115); and that inspection with the Rota machines may not take place until after the ampuls have been stored for extensive periods of time (R.69, 115). In sum, plaintiff has failed to establish that the Rota machines are parts of machinery used for filling and sealing bottles, cans, boxes, bags, or other containers, and therefore its claim under item 662.20, TSUS, is dismissed.

Plaintiff's alternative claims that the Rota machine is an article similar to a magnifying glass (item 708.85) or is a frame or mounting

[12] Plaintiff argues that inasmuch as the Government has never disclosed whether the imported machines were classified as "measuring" or as "checking" instruments under item 710.90, TSUS, no presumption of correctness attaches to the classification, citing *Broadway-Hale Stores, Inc.* v. *United States*, 63 Cust. Ct. 194, C.D. 3806 (1969). Defendant disputes that contention, citing *United States* v. *John V. Carr & Son, Inc.*, 61 CCPA 41, 45, C.A.D. 1116, 495 F.2d 771 (1974). Since we have found that the classification is erroneous as a matter of law, it is unnecessary to decide whether or not there was initially a presumption of correctness attaching to the classification.

for a magnifying glass (item 708.91) are so patently lacking in merit as to require no discussion. Accordingly, plaintiff's claims under items 708.85 and 708.91 are dismissed.

Finally, since the Rota is unquestionably a machine within the common meaning of the term, and as I have found that there is no other tariff description which more specifically describes the imports than item 768.50, TSUS, I conclude that the merchandise in issue is properly dutiable as machines not specially provided for.

Judgment will be entered accordingly.

(C.D. 4717)

L. B. WATSON CO., a/c MURPHY REIR, INC. *v.* UNITED STATES

Toys—Inflatable vinyl reindeer and Santa Claus figures

Certain inflatable vinyl reindeer and Santa Claus figures assessed with duty at the rate of 35 percent ad valorem under item 737.40 of the Tariff Schedules of the United States as other toy figures of animate objects held properly assessable at 17 percent ad valorem under item 772.97 as other Christmas ornaments.

ABSENCE OF SAMPLE

While a sample of the imported articles was not offered in evidence, there was credible testimony in lieu thereof not only sufficient to inform the court about the nature and essential characteristics of the imported figures, but to establish that such figures were similar in all material respects to the figures involved in *Davis Products, Inc., Frank M. Chichester* v. *United States*, 59 Cust. Ct. 226, C.D. 3127 (1967) in which case the imported figures were found to be articles of Christmas display decorations and not toys.

CHIEF USE—EVIDENCE

The uncontradicted testimony of a single, competent and credible witness may be sufficient to discharge the burden of proof on a chief use issue.

Court No. 67/9660–87472

Port of Los Angeles

[Judgment for plaintiff.]

(Decided October 18, 1977)

Stein, Shostak, Shostak & O'Hara, Inc. (*S. Richard Shostak* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

MALETZ, Judge: This case involves the dutiable status of inflatable vinyl reindeer articles described on the invoices as VNC 200

(Randy Reindeer) and of inflatable vinyl Santa Claus figures described on the invoices as VNC 301 (Standing Santa 24″). The articles which were imported from Japan and entered in September 1965 at the port of Los Angeles-Long Beach for the account of Murphy Reir, Inc. of Tower Lake, Illinois were classified by the district director of customs under item 737.40 of the Tariff Schedules of the United States (TSUS) as other toy figures of animate objects (except dolls), not having a spring mechanism, not stuffed, and not wholly or almost wholly of metal, and assessed with duty at the rate of 35 percent ad valorem.

Plaintiff claims that the importations are properly classifiable under item 772.97, TSUS, as other Christmas ornaments of rubber or plastics and thus dutiable at the rate of 17 percent ad valorem.

The pertinent provisions of TSUS are as follows:

Classified under:		
Schedule 7, Part 5, Subpart E:		
	Toy figures of animate objects (except dolls):	
	Not having a spring mechanism:	
	* * * * * * *	
	Not stuffed:	
737.35	Wholly or almost wholly of metal * * *	
737.40	Other	35% ad val.
Claimed under:		
Schedule 7, Part 12, Subpart C:		
	Nativity scenes; Christmas ornaments; crucifixes; miniature altars, shrines, and holy-water fonts; religious figurines and statuettes; other religious articles; all the foregoing (not including any article provided for in part 6A of this schedule) of rubber or plastics:	
772.95	Christmas tree ornaments	* * *
772.97	Other	17% ad val.

The present record consists of the testimony in April 1976 of Sidney L. Friedlander, together with the records of *Davis Products, Inc., Frank M. Chichester* v. *United States*, 59 Cust. Ct. 226, C.D. 3127 (1967) and *New York Merchandise Co., Inc.* v. *United States*, 66 Cust. Ct. 69, C.D. 4169 (1971) which were incorporated by orders of the court dated April 15, 1976.

In support of its claim, plaintiff contends that the merchandise here in issue is similar in all material respects to the merchandise in issue in the incorporated *Davis Products* case. In that case, certain

inflatable vinyl reindeer and Santa Claus figures were classified by the government under paragraph 1513 of the Tariff Act of 1930, as modified, as other toys not specially provided for, and assessed with duty at the rate of 35 percent. The court held, however, that as claimed by plaintiffs, the importations were primarily marketed, sold and used as articles of Christmas display decorations and not as toys, and were therefore properly classifiable by similitude to manufactures of rubber under paragraph 1537(b) of the 1930 Tariff Act, as modified, and thus dutiable at the rate of 12½ percent.[1]

Against this background, the major issue here is whether or not the imported articles involved in the present case are similar in all material respects to the inflatable vinyl reindeer and Santa Claus figures involved in the *Davis Products* case. As to this, it is to be noted that no sample of any of the importations here in question has been offered by plaintiff to support its claim. And in this connection, while it is not necessary for a plaintiff to offer a sample of the imported merchandise, it must, however, present adequate evidence to establish the nature and essential characteristics of the importation. *New York Merchandise Co., Inc.* v. *United States*, *supra*, 66 Cust. Ct. 69; W.T. *Grant Co.* v. *United States*, 74 Cust. Ct. 3, C.D. 4579 (1975).[2]

With these considerations in mind, plaintiff insists that the testimony of Mr. Friedlander—who was the sole witness in the present case—not only informs the court about the nature and essential characteristics of the imported vinyl reindeer and Santa Claus figures, it establishes that such figures are similar in all material respects to the vinyl reindeer and Santa Claus figures that were involved in *Davis Products*.

It is in this setting that we now consider the testimony of Mr. Friedlander who, as in the present case, was the sole witness in the incorporated *Davis Products* case.[3] In the present case, Mr. Friedlander testified to the following effect: In the latter part of 1964, he left his position as executive vice president of Davis Products, and after a two-month hiatus became vice president in charge of the purchase

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[1] The Tariff Act of 1930—unlike the TSUS—did not have specific provisions for Christmas ornaments.

[2] Plaintiff on two prior occasions moved for summary judgment in the present case on the basis that affidavits of Mr. Friedlander established the necessary similarity. Both motions were denied, however, on the ground that the affidavits failed to inform the court about the nature and essential characteristics of the imported merchandise. *L. B. Watson Co.*, a/c *Murphy Reir, Inc.* v. *United States*, 74 Cust. Ct. 193, C.R.D. 75-2 (1975); *L. B. Watson Co.*, a/c *Murphy Reir, Inc.* v. *United States*, 75 Cust. Ct. 185, C.R.D. 75-5 (1975).

[3] Mr. Friedlander was also one of four witnesses who testified in the incorporated *New York Merchandise Co.* case, *supra*, 66 Cust. Ct. 69. In that case certain vinyl figures were likewise claimed to be similar in all material respects to the vinyl figures involved in *Davis Products*. The court overruled the importer's claim that the figures were properly classifiable under item 772.97 as other Christmas ornaments and not as toys, on the ground that the importer neither offered a sample of the imported articles in evidence nor presented adequate testimony in lieu thereof which would inform the court about characteristics of the article which were important in determining whether or not they were toys. In the absense of such evidence, the court remained uninformed about crucial factors in the case.

and sale of inflatable articles for Murphy Reir which was engaged in the premium business, i.e., selling merchandise to companies that in turn either gave the merchandise away free or sold it at low prices to their customers. All the imported figures were sold by Murphy Reir to the Murphy Oil Company of Chattanooga, Tennessee.

Mr. Friedlander testified that for a period of two to three years prior to the present importations in 1965, vinyl inflatables were sold to the Murphy Oil Company by Davis Products, Inc., and that Murphy Reir took over the account after Davis Products went out of business. As vice president of Murphy Reir, Friedlander stated that he went to the Asahi Chemical Company in Japan and arranged for Asahi to supply Murphy Reir with the same inflatable vinyl reindeer and Santa Claus figures it had previously manufactured for Davis Products. Asahi was told by Friedlander to produce the figures exactly the same way it had produced them for Davis Products.

Mr. Friedlander stated that the Murphy Reir VNC 301 was a 24-inch "Standing Santa" inflatable figure which was the same in all material respects as the Davis Products N902 (15-inch Santa Claus figure) and the Davis Products N910 (26-inch Santa Claus figure), except for size.[4] The witness further stated that the imported Murphy Reir VNC 200 ("Randy Reindeer") was the same in all material respects as the Davis Products N904 ("Randy Reindeer"), except for color.[5]

Mr. Friedlander went on to state that the imported merchandise was identical to the merchandise in the *Davis Products* case in the following respects: (1) It was made from the same type of 10-gauge heavy-duty vinyl material with special low-temperature formulation, purchased from the same source, Mitsubishi Monsanto; (2) the same heat-sealing dies and silk screens were used in its production; (3) it had identical fastening tabs; and (4) as in the case of the Davis Products importations, it did not have whistles or other noisemakers. Continuing, Mr. Friedlander testified that the use of the present importations was the same as the use of the importations imported in the *Davis Products* case; that such use did not change from 1961 to 1965; and that the importations were designed for specific use as Christman decorations as evidenced by the heavy low-temperature vinyl utilized, the realistic rather than cartoon features employed in their design and the presence of fastening tabs so they could be secured as a display.

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[4] With regard to the size of these inflatables, Mr. Friedlander indicated that the VNC 301 was about 15 or 16 inches tall when inflated while it was 23 or 24 inches tall deflated. According to his testimony, when a figure is inflated its overall volume increases, thus diminishing its length.

[5] Thus, the witness Friedlander recalled that the VNC 200 was sold in white, brown and metallic brown, while the record in the *Davis Products* case shows that the N904 was sold only in white and brown.

Defendant maintains, however, that Friedlander's testimony on cross-examination damaged his entire credibility. To support this contention, defendant notes that on cross-examination Mr. Friedlander could not (i) recall the Murphy Reir VNC 300, 201, 302, 400, 401, 402 and 100 series;[6] (ii) recall the VNC number for the Murphy Reir 36-inch inflatable reindeer; (iii) recall what the Davis Products N908, N914, N915 or N916 were; (iv) recall if the N916 was a different animal character; (v) nor recall whether the N908, N915, or N916 were in the Davis Products Christmas line despite the fact that in the record in the incorporated *Davis Products* case, Friedlander indicated when he testified in 1965 that the N915 and N916 were reindeer.

Defendant further notes that Friedlander testified in the present case that all color variations of the same article had the same "VNC" number for Murphy Reir products and the same "N" number for Davis Products. In contrast to this testimony, defendant observes that when Mr. Friedlander testified in 1965 in the *Davis Products* case he stated that the Davis Products N916 reindeer was identical to the N915, except that the N916 was in assorted white and brown colors and the N915 was in gold and that the only reason the N915 and N916 reindeer were given different item numbers was because they came in different colors.

As an additional factor assertedly undermining Friedlander's testimony, defendant further observes that at the trial of the present action Friedlander testified that his company (Murphy Reir) used 10-mm gauge vinyl for the imported figures and never used 8 to 8½-mm gauge plastics in the manufacture of its products. Defendant adds that in the incorporated *New York Merchandise Co.* case Friedlander testified in May 1969 that the general industry specifications for inflatable Christmas articles were 8 to 8½-mm gauge regardless of size. (It should be noted Friedlander also testified in that case that in some of the very large inflatable Davis Products imported, which were specially designed for rugged outdoor use, it used heavier gauge material.) Continuing, defendant quotes a portion of Friedlander's testimony in the incorporated *New York Merchandise Co.* case to the effect that the smaller size figures imported by Davis Products were 8 to 8½-mm gauge. From all this, defendant draws the apparent conclusion that there is an inconsistency between Mr. Friedlander's testimony that while it was an industry-wide practice to use 8 to 8½-mm gauge, the Murphy Reir imports were 10-mm gauge. The fact is, however, that Mr. Friedlander's testimony in the incorporated cases made it clear that it was commonplace for 10-mm gauge vinyl to be used for rugged outdoor use. Indeed, as this court stated in the

[6] There is nothing in the record of the present case—catalogue or otherwise—to indicate what, if any, items these VNC numbers respresented.

New York Merchandise Co. case, *supra*, 66 Cust. Ct. at 72: "In the *Davis* [*Products*] case, Friedlander testified that the imported vinyl Santa Claus figures there involved were introduced in the market to replace Christmas decorations composed of cardboard, wood, Masonite and other hardboard products; *that the purpose of manufacturing the imported figures was to achieve a display article for outdoor as well as indoor use; that to this end, the vinyl used in the figures was 10 gauge*—which, he said, was a heavier gauge than the 8 gauge usually found in the company's normal toy items * * *." (Emphasis added.)

Beyond that, defendant refers to Friedlander's concession on cross-examination at the present trial in 1976 that he did not remember the Davis Products line as clearly as he did in 1965. It should also be pointed out though that on additional cross-examination Friedlander testified that he did, however, recollect the *use* of the Davis Products and Murphy Reir importations since "things of the nature of how products are used are things one retains in their memory for a long, long time." (R. 52)

Notwithstanding defendant's challenge, the court finds that Mr. Friedlander was a credible witness and that his testimony in the present case establishes that the imported articles involved here are similar in all material respects to the inflatable vinyl reindeer and Santa Claus figures involved in the *Davis Products* case. What is more, Mr. Friedlander's testimony is, in the court's view, adequate to establish the nature and essential characteristics of the importations.

It is quite true that Mr. Friedlander was not able to recall style numbers and other details concerning items not in controversy. But in view of a lapse of some eleven years since Friedlander sold the merchandise, it is natural that his memory regarding such details was not perfect. And it is equally natural that his memory with regard to the imported reindeer and Santas would be more accurate for the reason that he had focused in on these specific items when he testified about them in 1965 in the *Davis Products* case.

In short, the record establishes a credible state of facts wherein the Murphy Reir company found a need to supply the Murphy Oil Company with the same Christmas reindeer and Santa Claus figures Murphy Oil had previously obtained from Davis Products. It was in these circumstances that Murphy Reir employed Friedlander, who was formerly the vice president of Davis Products in charge of inflatable goods, to handle the Murphy Oil requirements for the same Christmas inflatable figures the latter had previously purchased from Davis Products. In accordance with his new responsibilities, the court finds credible Mr. Friedlander's testimony that he thereupon went to Asahi—the manufacturer in Japan which had produced the inflatable figures for Davis Products—and ordered for Murphy Reir the same

inflatable figures made from the same heat-sealing dies and the same silk screens and which had the same fastening tabs as the Davis Products figures.

Defendant finally argues that even if plaintiff has proven that the imported merchandise was the same as the merchandise involved in *Davis Products*, plaintiff failed to prove that the class or kind of merchandise to which the imported merchandise belongs was chiefly used as Christmas decorations throughout the United States during 1965. See TSUS General Interpretative Rule 10(e)(i).[7] In this context—and leaving aside the question of *stare decisis*—it is instructive to recall that Mr. Friedlander—who was the sole witness in the incorporated *Davis Products* case—testified in that case in 1965 that the chief use of the involved class of inflatable figures in representative geographical centers of the country was as outdoor Christmas decorations and not as toys. On the basis of Friedlander's uncontradicted testimony, the court concluded that plaintiff had made a *prima facie* showing that the "individual vinyl Santa and Reindeer figures * * * are primarily * * * used as articles of Christmas display and not as toys." 59 Cust. Ct. at 231. In reaching this conclusion, the court commented (59 Cust. Ct. at 229):

> A toy being an article chiefly used for the amusement of children, as defined in paragraph 1513, it was plaintiffs' burden of proof to show, on the basis of an adequate geographical section of the country, another and different prevailing use for the imported merchandise. *L. Tobert Co., Inc., et al.* v. *United States*, 41 CCPA 161, C.A.D. 544. To establish such proof, it has been recognized that the uncontradicted testimony of a single, competent, and credible witness may be sufficient. *Catton, Neill & Co. (Ltd.)* v. *United States*, 11 Ct. Cust. Appls. 278, T.D. 39084; *J. E. Bernard & Company, Inc.* v. *United States*, 27 Cust. Ct. 291, Abstract 55793.
>
> In the instant case, testimony for the plaintiffs was given by a man [Sidney L. Friedlander] who demonstrated an intimate knowledge on every phase of the handling of this merchandise—design, production, importation, and sale. We quite agree with the statement in defendant's brief that he is "an interested witness," interested in the sense that he was in a position to know, and it was logical for him to know, the characteristics and uses of the articles at bar. As such, his testimony is of high probative value. * * *

In the present case, the same Mr. Friedlander (as previously indicated) testified without contradiction that the use of the present

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[7] Even before the enactment of TSUS, the test of chief use under the Tariff Act of 1930 was the same, i.e., the chief use of that class or kind of article at the time of importation throughout the United States. See e.g., Sturm, *A Manual Of Customs Law* (1974) p. 222.

importations—which were entered in 1965, the same year he testified in the *Davis Products* case—was the same as the use of the figures imported in the *Davis Products* case; that such use did not change from 1961 to 1965; and that the importations were designed for specific use as Christmas decorations as evidenced by the heavy low-temperature vinyl utilized, the realistic rather than cartoon features employed in their design and the presence of fastening tabs so they could be secured as a display. Considering the thrust of this testimony, the above-quoted comments of this court in *Davis Products* are equally applicable here as to chief use and the court must conclude, as it did in *Davis Products*, that the individual vinyl Santa and reindeer figures were chiefly or primarily used as articles of Christmas display or decoration and not as toys.

For the reasons stated, it is held that the imported inflatable reindeer and Santa Claus figures are properly classifiable under item 772.97 as other Christmas ornaments of rubber or plastics, dutiable at the rate of 17 percent ad valorem. Plaintiff's claim is therefore sustained and judgment will be entered accordingly.

(C.D. 4718)

THE AMERICAN GREINER ELECTRONIC, INC. *v.* UNITED STATES

Watch timers—Export value

EXPORT VALUE—SELECTED PURCHASER—FAIRLY REFLECTS MARKET VALUE—PROOF

When an importer, on the basis of sales to a selected purchaser, seeks to substitute export value for constructed value as the basis of appraisement, there still must be some credible proof that the sales fairly reflect market value.

Court Nos. R61/20887, etc.

Port of New York

[Judgment for defendant.]

(Decided November 4, 1977)

Barnes, Richardson & Colburn (*Joseph Schwartz* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: These actions, consolidated for trial,[1] involve the valuation of variously described watch timers and parts exported from Switzerland in the years 1958, 1959, 1961 and 1962. The mer-

[1] The consolidation covers 42 separate actions nominally known as appeals for reappraisement.

chandise was manufactured and exported by Greiner Electronic, Ltd., of Langenthal, Switzerland. It was imported into the United States by the American Greiner Electronic, Inc., Stamford, Connecticut.

Pursuant to section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956,[2] the merchandise was appraised at various unit values on the basis of constructed value.[3] The preferred statutory basis for valuing imported merchandise is export value.[4] Plaintiff alleges that the merchandise in these consolidated actions should all be appraised at the values represented by the invoice prices on the preferred export value basis, as provided for in section 402, which defines export value, including definitions.[5]

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[2] 19 U.S.C. § 1401a.
[3] 19 U.S.C. § 1401a(d).
[4] 19 U.S.C. § 1401a(b).
[5]

Export value

(b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the course ordinary of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

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Definitions

(f) For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

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(4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value, United States value, or constructed value, as the case may be, can be satisfactorily determined:

(A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

The appraisement on the basis of constructed value is presumed to be correct.[6] Presumptively, therefore, as defined above, there was no export value for the merchandise at the times exported. *Mannesmann-Meer, Inc.* v. *United States*, 58 CCPA 6, 8, C.A.D. 995, 433 F. 2d 829, 831 (1970). In challenging the appraisement, plaintiff must prove the price, at the times of exportation to the United States, at which the imported merchandise was freely sold in Switzerland in the ordinary course of trade for exportation to the United States.

The only evidence on the issue of export value in this case is the testimony of the president of Greiner Electronic, Ltd., Mr. Rudolph Greiner, Jr. of Langenthal, Switzerland. He testified that in 1958, after college, he went to work in the office of Swiss Greiner and also did some work in the laboratories at the plant site to broaden his technical background; that he stayed with Swiss Greiner until 1959; that in 1960 he went to work for American Greiner and remained there two years as office manager and service manager; that he returned to Swiss Greiner in 1962 and remained there until 1965 doing, successively, public relations, sales administration, pricing, invoicing, and export paper work.

Mr. Greiner further testified that Swiss Greiner organized American Greiner to service its products in the United States markets; that the business of American Greiner was to buy equipment manufactured by Swiss Greiner and then sell and service the equipment in the United States; that in the years 1958 through 1962, Swiss Greiner sold watch timers and parts to no one but American Greiner; that Swiss Greiner and American Greiner are not related companies; that they do have a common stockholder, namely, his father who at the times of exportation owned 98 percent of the stock in Swiss Greiner and 100 percent of the stock in American Greiner.

Asked if he was familiar with the manner in which the selling prices from Swiss Greiner to American Greiner were arrived at, Mr. Greiner testified that he was present and participated at most of the negotiations between Mr. Dupont, manager of American Greiner, and Mr. Lenzin, sales manager for Swiss Greiner. When questioned about the negotiations, Mr. Greiner responded as follows (R. 20–23):

> Q. Was there a basis used in determining the selling price—withdrawn. I show you the Court file in R61/20887. Will you please look at the invoice in this case—take it out of the envelope, please. What does that case cover?—A. That covers two instruments, Super-Spiromatic with four plates which are accessories to that instrument.
>
> Q. What is the date of that invoice?—A. September 30, 1959.
>
> Q. And what is the invoice price of that merchandise?—A. 13,450 Swiss Francs.
>
> Q. What is the unit price?—A. 6,225 Francs, for the machine.
>
> Q. Do you know how that price was determined?—A. Yes.
>
> Q. Tell us how it was determined—excuse me, I will ask another

[6] 28 U.S.C. § 2635.

question. Is that the result of your participation in these various negotiations?—A. Yes, it was.

Q. That you have been talking about?—A. Yes.

Q. How was that price determined?—A. This price was determined in a negotiation between Greiner Limited and American Greiner, a negotiation that was to assure a fair profit to Swiss Greiner and to American Greiner.

Q. Do you know whether that was the basis of the negotiations for the remaining shipments that were exported?—A. That was the basis for all these exports that we are talking about.

Q. What do you say the objective was in these negotiations?—A. To come to a price that allows Swiss Greiner and American Greiner both to make a fair profit.

Q. And would you tell us whether that objective was realized?—A. For American Greiner we did not make the money that we expected to make.

Can you tell us the reason or reasons for that?

* * * * * * *

THE WITNESS: The expenses, the selling expenses and servicing expenses of American Greiner were higher than planned and the market was not as big as budgeted and because the competition was stiffer than expected.

Additionally, Mr. Greiner testified that there were other companies, competitors in Switzerland, in the same business as Swiss Greiner. (R. 26.)

On the cross-examination relevant to the negotiations between Swiss Greiner and American Greiner, Mr. Greiner restated that he did not participate in each and every negotiation involving prices, but did participate in most of them; that his father participated in some of the negotiations and while theoretically, his father had the final say, as a practical matter his father delegated the power to negotiate; that Mr. Lenzin was under obligation to make money for Swiss Greiner and Mr. Dupont had to make money for American Greiner; that in 1960 and 1961 he and Mr. Dupont worked together; that sometimes Mr. Dupont went to Switzerland and sometimes Mr. Lenzin and his father came to the United States and they would all get together and negotiate.

The record, in my opinion, establishes that in the period 1958 through 1962, Swiss Greiner did not sell or offer to sell the exported merchandise to anyone but American Greiner. Defendant's position to the contrary,[7] at the times of exportation, I find, therefore, that American Greiner was a "selected purchaser" within the meaning of section 402(f)(1)(B) of the Tariff Act of 1930, as amended, *supra*, footnote 5. Assessing and weighing the testimony of Rudolph Greiner, Jr., I conclude that it does not probatively establish that the invoice

[7] Based on Greiner Sr.'s control of the two companies, defendant argues that American Greiner was an agent and did not buy the merchandise from Swiss Greiner. There is, however, no evidence that ownership of the imported merchandise was not transferred from Swiss Greiner to American Greiner for a valuable consideration. *J. L. Wood* v. *United States*, 62 CCPA 25, 33, C.A.D. 1139, 505 F. 2d 1400, 1406 (1974).

prices at which Swiss Greiner sold the watch timers and parts to American Greiner fairly reflect the market value of that merchandise.

The new starting point of judicial evaluation of issues involving sales to selected purchasers is *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F 2d 1400 (1974). In that case, upon consideration of the legislative history and intent of section 402, as amended by the Customs Simplification Act of 1956, the court of appeals stated as follows:

> From the foregoing, we conclude that Congress clearly intended that export value be determined by considering only the exporting country's market for exportation to the United States and that sales at wholesale to exclusive or selected agents be used in determining export value if the prices fairly reflect the market value. *United States* v. *Acme Steel Co.*, 51 CCPA 81, C.A.D. 841 (1964) is hereby overruled to the extent that it approved consideration of sales in the domestic market of the exporting country in the determination of export value. * * * [62 CCPA, p. 32.]

The *Wood* decision has rendered obsolete much, if not all, of the case law that preceded it as to the kind of proof considered relevant in determining that a price to a selected purchaser fairly reflected market value.[8]

This case poses the difficult question raised by the *Wood* decision, that is, can a price to a selected purchaser fairly reflect market value when, as customs officials stated in commenting on the *Wood* decision:

> * * * the "necessary market evidence" is not available; i.e., when there are sales only to related selected purchasers, or sales only to one unrelated selected purchaser. Then the criterion applied by the court is not available, for there would be no "market" for export to the United States outside of the sale in question. This leaves three possible courses of action: (1) to automatically accept the price as establishing export value, (2) to automatically reject the price for lack of evidence that it fairly reflects the market value; or, (3) to use other available evidence for comparison purposes. [10 Cust. Bull. 207, T.D. 76-118 (1976).]

It goes without saying that the law, namely, section 402(f)(1)(B), precludes automatic acceptance or rejection of a sales price to a selected purchaser. The difficulties of proof inherent in the statutory concept of price to a selected purchaser which fairly reflects market value, notwithstanding, it is my opinion that there still must be some credible proof that price, on a sale to a selected customer fairly reflects market value, when a plaintiff seeks to substitute export value for constructed value. *Cf.*, *Mannesmann-Meer, Inc.* v. *United States*, 57 Cust. Ct. 697, 702, R.D. 11243 (1966), *aff'd on review*, 62

[8] See, Strum, *A Manual of Customs Law* (Supp. 1976), p. 26.

Cust. Ct. 1023, A.R.D. 253 (1969), *aff'd on appeal*, 58 CCPA 6, C.A.D. 995, 433 F. 2d 829 (1970). If it is ever possible to determine that invoice prices to a "selected purchaser at wholesale" "fairly reflect the market value" without evidence of prices in other kinds of transactions for comparison purposes, that is so only when the relations between buyer and seller are clearly set forth and are such as to warrant an inference that they dealt at arm's length. *National Carloading Corporation* v. *United States*, 57 Cust. Ct. 758, 759, A.R.D. 215 (1966).

As the record here fails to produce any credible standard for determining whether invoice prices fairly reflect market value, plaintiff, in my opinion, has failed to prove an export value. Plaintiff asks the court to find that the invoice prices in these consolidated actions fairly reflect market value because:

> The record establishes without dispute that the selling prices were the result of negotiations between Greiner Electronic Ltd. and American Greiner Electronic, Inc. The only witness in the case, Rudolph Greiner, Jr., was present at most of the negotiations which took place between Mr. Dupont on behalf of American Greiner and Mr. Lenzin of Greiner Ltd. * * * Mr. Greiner testified that the object of the negotiations was to assure a fair profit to Swiss Greiner and to American Greiner, that is a price which allowed both Swiss Greiner and American Greiner to make a fair profit * * *. [Plaintiff's brief, p. 17.]

Plaintiff further argues that the negotiations were *bona fide* because both Mr. Lenzin and Mr. Dupont were under an obligation to make a profit for their respective firms, and defendant has failed to come forward with any evidence which contradicts or weakens the importer's case. In truth, however, what defendant has or has not done, is not as important as plaintiff's proof. Ultimately, plaintiff's case must rest on the strength of its own evidence, assessed in practical terms, considering such factors as completeness, adequacy of bases, and possible motives to deceive. *Mannesmann-Meer, Inc.* v. *United States*, 58 CCPA 6, 8, C.A.D. 995, 433 F. 2d 829 (1970).

In *Mannesmann-Meer*, the court of appeals approvingly analyzed the rationale of the lower court as follows:

> * * * First, the appraiser's action is presumed correct. Inherent in the appraiser's use of constructed value under 19 U.S.C. 1401a(d) was the finding that export value could not be satisfactorily determined. See 19 U.S.C. 1401a(a)(3). * * * In a practical evaluation of appellant's evidence, the tribunals below found the following weaknesses, among others, therein:
>
> 1. There was no evidence of specific transactions from which the court could judge the correctness of affiant's statement that the price charged was "normal."
>
> 2. There was no specific evidence as to how competitive conditions affected the price charged. [58 CCPA, pp. 8–9.]

The same rationale applies to this record. Assessing and weighing plaintiff's testimony in practical terms of completeness and his knowledge of the negotiated prices, the testimony that the prices were "negotiated" raises more questions than it answers. Essentially what is missing is evidence of the specific considerations and factors that affected the negotiated prices. There is nothing wrong with a price fixed so as to assure a profit to both sides. But from the standpoint of Mr. Greiner, Sr., who owned 98 percent of the stock in Swiss Greiner and 100 percent of the stock in American Greiner, profit earned on one side of the business transaction might be more beneficial than profit earned on the other. In short, the profit motive of the seller and buyer alone does not establish that, in this case, the prices fairly reflect market value. There is no probative evidence of the manner in which the invoice prices were determined, and whether competitive conditions affected the invoice prices, or even whether the profit represented a reasonable profit in the ordinary course of trade.

Plaintiff has not overcome the presumption of correctness that attaches to the appraisements. I am not unmindful of the recent decision in *D. H. Baldwin Co. et al.* v. *United States*, 78 Cust. Ct. 164, C.D. 4704, 432 F. Supp. 1351 (1977), appeal 77–29, and as an appeal is still pending make no comment upon it here.

I find as facts:

1. That the merchandise of these appeals consists of watch timers and parts manufactured by Greiner Electronic, Ltd., of Langenthal, Switzerland, a firm in which, at the times of exportation in 1958, 1959, 1961 and 1 62, a Mr. Greiner, Sr. held 98 percent of the capital stock.

2. That the merchandise was imported by The American Greiner Electronic, Inc., of Stamford, Connecticut, a firm in which, at the times of exportation, Mr. Greiner, Sr. held 100 percent of the capital stock.

3. That, at the times of exportation, Swiss Greiner sold the merchandise of these appeals only to American Greiner.

4. That the merchandise was appraised on the basis of constructed value, as defined in section 402(d), Traiff Act of 1930, as amended by the Customs Simplification Act of 1956.

5. That plaintiff claims there is an export value, as defined in section 402(b), as amended.

I conclude, as a matter of law:

1. That plaintiff's proofs failed to overcome the presumption that constructed value, as defined in section 402(d), as amended, is the proper basis for valuation of the merchandise in these consolidated appeals for reappraisement.

2. That the record does not establish an export value for the merchandise, as defined in section 402(b), as amended.

3. That the constructed values are the appraised values.

Judgment will be entered accordingly.

(C.D. 4719)

J. D. SMITH INTEROCEAN, INC., ET AL. *v.* UNITED STATES

Naphtha—Motor fuel

Importations of petroleum derivatives claimed to be properly subject to classification as naphtha under item 475.35, Tariff Schedules of the United States, *held* properly classified as motor fuel under item 475.25, Tariff Schedules of the United States.

Samples and tests performed by customs are presumed to be correct. *Cresca Co. (Inc.)* v. *United States*, 15 Ct. Cust. Appls. 105, T.D. 42185 (1927).

Court Nos. 72-10-02178, etc.

Port of New York

[Judgment for defendant.]

(Decided November 10, 1977)

Donohue and Donohue (*Joseph F. Donohue, Sr., Joseph F. Donohue, Jr.*, and *James A. Geraghty* of counsel) for the plaintiffs.

Barbara Allen Babcock, Assistant Attorney General (*Max Schutzman* and *Sidney N. Weiss*, trial attorneys), for the defendant.

FORD, Judge: This action involves a joint trial of seven cases listed in schedule A, annexed hereto and made a part hereof. The cases arise from four separate shipments of a petroleum derivative variously described on the invoices as "Unfinished Heavy Naphtha," "Heavy Unfinished Naphtha" or "Unfinished Naphtha." The merchandise was produced in the Virgin Islands and shipped by Hess Oil Virgin Islands Corp. Entries were made in the names of two customhouse brokers for the account of several oil companies or directly in the name of the importer of record.

The merchandise involved was classified by customs under item 475.25, Tariff Schedules of the United States, which provides for duty at the rate of 1.25¢ per gallon on motor fuel. Plaintiffs contend the imported merchandise is naphtha and as such subject to classification under item 475.35, Tariff Schedules of the United States, which prescribes duty at 0.25¢ per gallon. The pertinent provisions of the tariff schedules are as follows:

General Headnotes and Rules of Interpretation

* * * * * * *

10. General Interpretative Rules. For the purposes of these schedules—

* * * * * * *

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

* * * * * * *

Schedule 4, part 10 headnote:

* * * * * * *

2. For the purposes of this part—

* * * * * * *

(b) "Motor fuel" (item 475.25) is any product derived primarily from petroleum, shale, or natural gas, whether or not containing additives, which is chiefly used as a fuel in internal-combustion or other engines.

* * * * * * *

475.25	Motor fuel	1.25¢ per gal.
* * * * * * *		
475.35	Naphthas derived from petroleum, shale oil, natural gas, or combinations thereof (except motor fuel)	0.25¢ per gal.

Presented by the parties for determination is the issue of whether the imported merchandise conforms to the standards for motor fuel. Additionally, as a matter of proof, defendant has raised the issue of whether the samples analyzed by plaintiffs are in fact the samples of merchandise at bar.

The record consists of the testimony of two witnesses called on behalf of plaintiffs and two on behalf of the defendant. In addition, plaintiffs have introduced into evidence 9 exhibits and the defendant has introduced 1 collective exhibit containing 11 reports of the U.S. Customs Laboratory covering the 11 entries involved. The entry papers have been received in evidence without being marked. At the outset of the trial plaintiffs abandoned entry 100497 of Court No. 73–2–00550. Accordingly, claims as to said entry and action are hereby dismissed.

By virtue of the classification under item 475.25 *supra* and the defendant's answers, there is no issue of fact regarding the derivation of the imported merchandise from petroluem. Of primary importance is whether the samples analyzed by plaintiffs or those analyzed by defendant represent the imported merchandise. The record establishes that customs submitted samples to the customs laboratory indicating entry numbers or ID numbers. Plaintiffs contend they submitted samples to customs which defendant denies. The analyses of plaintiffs are not connected by entry number but rather by vessel and date of sampling and testing. Ordinarily, information containing the name of the vessel and the date the merchandise was sampled and tested might easily establish a connection with the importations. However, in the instant case the tankers have many compartments which were described as follows:

> Q. When you speak of a "composite" and a "compartment," what is a "compartment"? Please describe the cargo which is in a compartment?—
>
> Where is it? Is it in a tank or——? A. Each ship literally consists of a number of compartments. This is done for reasons of shipping. The material has to be spread out evenly so that you can't have material in the forward and aft section—the ship will split in half. Consequently, when you load a ship it has to be loaded in such a way so that when you unload it at a port, the receiving terminal, you have to take it off in the right allocation, or the right sequence; so that, in turn, no damage is done to the ship itself. So that you could wind up, if you are carrying three different materials aboard a vessel, you could literally wind up having compartments one port and starboard; three center; seven port and starboard; nine center—of one material; and, then, spread the rest of the other two compartments or products out approximately the same way—so that when you unload one material literally you have a balance laying in the water and there is no part of that ship that has any extra stress on it.
>
> Q. After you have taken what you have described as a composite sample of the merchandise on the vessel, what is done with those samples?—A. I might also say, I did forget to mention that when we take the composite sample we take average samples out of every compartment—which means we put a sampler down at the bottom and pull it through, so that you get a proportion of every part of the compartment—and that's what's used as a composite.

It is evident from the foregoing that there may be variations between the compartments. Both parties have utilized the ASTM tests designated in T.D. 66–23(13) as D–287, D–86 and D–323. Plaintiffs also performed additional ASTM tests which are not pertinent to the decision.

Chemistry, unlike law, is an exact science. Since both parties had chemists analyze the imported merchandise using the same method, ASTM, the results for the identical merchandise should be the same or within a reasonable tolerance. This, however, is not the fact and

neither party has challenged the competence of the chemists. The court agrees with defendant that there has been no showing of a connection between the imported merchandise and that analyzed by plaintiffs' chemists.

Plaintiffs further contend the length of time between taking of the samples and the analyses by the Government might cause evaporation which could change the results. This contention with respect to evaporation is not borne out by the tests. The testimony of Messrs. Sparkman and Koval establish that if evaporation had taken place the A.P.I. gravity tests and the Reid vapor pressure tests would have shown a decrease. Their testimony also establishes that the 10%, 50% and 90% distillation tests would have shown an increase if evaporation had occurred. Plantiff's exhibit 1 reveals an A.P.I. gravity of 58.7 while defendant's exhibits A–3 through A–9 establish an increase of an A.P.I. gravity to 59.5.

Similarly, plaintiff's exhibit 3 indicates an A.P.I. gravity reading of 58.0 while defendant's exhibit A–2 shows an increased reading to 59.2. The A.P.I. gravity as shown by plaintiffs exhibit 5 is 60.9 and defendant's exhibit A–1 shows an identical reading. While the distillation tests should have shown an increase if evaporation occurred, plantiffs' exhibit 2 gives a 90% distillation reading of 334 degrees, while defendant's exhibits A–10 and A–11 show a decrease to 333 degrees. Based upon these findings it appears that the length of time between sampling and testing by the customs laboratory did not establish the occurrence of evaporation, which would affect the results of the analyses.

The court does not have before it for determination the usual questions involved in chemical cases, such as whether one method of analysis is better than the other as in *T. H. Gonzalez* v. *United States*, 54 CCPA 104, C.A.D. 918 (1967), *aff'g* 53 Cust. Ct. 149, C.A.D. 2487 (1964) or whether the method of sampling by one party is in accordance with recognized standards. Where there is no adequate testimony connecting the sample with the importation, any testimony as to the use of the merchandise is not sufficient to establish such use. *Hawley & Letzerich et al.* v. *United States*, 19 CCPA 47, T.D. 44893 (1931).

The testimony relating to taking of samples by plaintiffs, their testing and use, are of little value unless such testimony can connect the samples tested with the importations. The testimony adduced herein does not satisfactorily connect the tests performed by plaintiffs with the importations. Defendant, on the other hand, while denying plaintiffs provided samples to the Government, was not aware of how or by whom the samples analyzed by the Government chemists were obtained. They were, however, designated as samples by entry numbers or ID numbers while plaintiffs' samples were designated by vessels and date of sampling and testing. The samples and tests performed by customs, in the absence of contrary evidence, are pre-

sumed to be correct. *Cresca Co. (Inc.)* v. *United States*, 15 Ct. Cust. Appls. 105, T.D. 42185 (1927).

Based upon the record made, plaintiffs have failed to overcome the presumption of correctness attaching to the classification. In view of this finding it is unnecessary for the court to consider the various other questions raised by plaintiffs. The action is, therefore, dismissed.

Judgment will be entered accordingly.

(C.D. 4720)

ABBEY RENTS *v.* UNITED STATES

Motorized wheelchairs

MOTOR VEHICLES—FURNITURE

The imported merchandise consists, among other features, of lightweight portable wheelchairs that can proceed up to four miles per hour, may be used both indoors and outdoors, are suitable for highway and street travel (except for street and intersection crossing) and give persons unable to walk a certain amount of independence and ability to get from place to place without assistance.

The term "furniture" as it appears in schedule 7, part 4, subpart A. headnote 1, has been held to be exclusionary and restrictive and that it embraces only such articles as are expressly described therein. *Karoware, Inc.* v. *United States*, 77 Cust. Ct. 112, C.D. 4681, 427 F. Supp. 402 (1976), *aff'd*, 65 CCPA —, C.A.D. 1197 (1977).

HELD. The merchandise was improperly classified as furniture under TSUS item 727.55 but should be classified as motor vehicles under TSUS item 692.10, as contended by plaintiff.

ALTERNATIVE CLAIM—BURDEN OF PROOF

Where defendant asserts an alternative claim in defense, the burden of proof as to that claim rests with the defendant. *J. M. Rodgers Co., Inc.* v. *United States*, 59 Cust. Ct. 91, C.D. 3084, 273 F. Supp. 442 (1967) (*rehearing granted on other grounds*, 60 Cust. Ct. 42, C.D. 3251 (1968)).

Court No. 76-2-00517

Port of Los Angeles

[Judgment for plaintiff.]

(Decided November 28, 1977)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Alan L. Langus*, trial attorney), for the defendant.

LANDIS, Judge: The merchandise in this case consists of A–BEC 12 and A–BEC 14 motorized wheelchairs imported from Great Britain

and Canada into the port of Los Angeles in 1975 and classified under item 727.55 of the Tariff Schedules of the United States (TSUS), which provides as follows:

SCHEDULE 7. – SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

Part 4. – Furniture; Pillows, Cushions, and Mattresses; Nontextile Floor Coverings

* * *		
	Furniture, and parts thereof, not specially provided for:	
* * *	Of unspun fibrous vegetable materials	* * *
	Of wood:	
* * *		
* * *	Of textile materials, except cotton	* * *
	Of rubber or plastics:	
* * *	Of reinforced or laminated plastics	* * *
* * *	Other	* * *
* * *	Of copper	* * *
727.55	Other	10% ad val.

Plaintiff claims that motorized wheelchairs are properly classifiable under TSUS item 692.10, which provides as follows:

SCHEDULE 6. – METALS AND METAL PRODUCTS

Part 6. – Transportation Equipment

* * *		
	Subpart B. – Motor Vehicles	
* * *		
	Motor vehicles (except motorcycles) for the transport of persons or articles:	
* * *		
692.10	Other	3% ad val.

Defendant seeks to blunt plaintiff's claim with an alternative claim that if the motorized wheelchairs are not dutiable under TSUS item 727.55 as classified, they are properly classifiable under TSUS item 727.04, which provides as follows:

SCHEDULE 7. – SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

Part 4. – Furniture; Pillows, Cushions, and Mattresses; Nontextile Floor Coverings

* * * * * * *

	Furniture designed for hospital, medical, surgical, veterinary, or dental use; dentists', barbers' and similar chairs with mechanical elevating, rotating, or reclining movements; and parts of the foregoing:	
727.02	Dentists', barbers' and similar chairs with mechanical elevating, rotating, or reclining movements, and parts thereof	* * *
727.04	Other	8.5% ad val.

Defendant bears the burden of establishing this alternative claim. As this court stated in *J. M. Rodgers Co., Inc.* v. *United States*, 59 Cust. Ct. 91, C.D. 3084, 273 F. Supp. 442 (1967) (*rehearing granted on other grounds*, 60 Cust. Ct. 42, C.D. 3251 (1968)): "Where defendant asserts a claim in defense, different from the liquidation classification, the burden is on defendant to prove it." *J. M. Rodgers* at 95.

Defendant basically argues that the imported motorized wheelchairs are "furniture", a term which for tariff purposes is defined in TSUS schedule 7, part 4, subpart A, as follows:

Subpart A headnote:

> 1. For the purposes of this subpart, the term "furniture" includes movable articles of utility, designed to be placed on the floor or ground, and used to equip dwellings, offices, restaurants, libraries, schools, churches, hospitals, or other establishments, aircraft, vessels, vehicles, or other means of transport, gardens, patios, parks, or similar outdoor places, even though such articles are designed to be screwed, bolted, or otherwise fixed in place on the floor or ground * * *.

This court has held the above headnote exclusionary and restrictive, and embracing only such articles as are expressly described therein. *Karoware, Inc.* v. *United States*, 77 Cust. Ct. 112, C.D. 4681, 427 F. Supp. 402 (1976), *aff'd*, 65 CCPA —, C.A.D. 1197 (1977); *Morris Friedman & Co.* v. *United States*, 69 Cust. Ct. 184, C.D. 4392, 351 F. Supp. 611 (1972). Quite obviously, as defendant puts it, A-BEC motorized wheelchairs are "chairs" of a sort, at least in the general sense of that term as a seat that a person can conveniently sit on. *Decorative Imports* v. *United States*, 43 Cust. Ct. 31, C.D. 2099 (1959). But I am unable to subscribe to defendant's view that motorized wheelchairs are "furniture" as that term is defined in TSUS, *supra*. In that regard, I am not inclined to quarrel with defendant's point that motorized wheelchairs would, in ordinary sense and understanding, be considered movable articles of utility, designed to be placed on the floor or ground. But in ordinary sense, it is not commonly understood that motorized wheelchairs are used to equip dwellings, offices, restaurants, libraries, schools, churches, hospitals, gardens,

patios, parks or similar outdoor places. Three witnesses testified for defendant. Not one of them testified that motorized wheelchairs are used to equip dwellings or hospitals in the common and ordinary sense projected by the definition.

One of defendant's witnesses, Mr. Glen E. Burrer, disabled for 24 years, appeared confined and seated in an A–BEC motorized wheelchair. Testifying that he had become keenly aware of power-driven chairs about 15 years ago, he stated as follows:

> Q. Now, what is the purpose of motorized wheelchairs? Isn't it to make people mobile, the handicapped people mobile?—A. Yes.
>
> Q. In other words, it is not used as one would use a piece of furniture?—A. Describe what you mean by "piece of furniture?"
>
> Q. Well, I point to this chair, I point to this table, I point to this chair and bench (indicating). These are what I think to be furniture. Would you use the motorized wheelchair in the same way as you would use these chairs?—A. No.
>
> Q. Why not?—A. Because I couldn't take that chair and get from my office to my Personnel Department.
>
> Q. So you are using it as a vehicle to get from one point to another?—A. That is right. [R. 102.]

To cut short the obvious, therefore, motorized wheelchairs are not ordinarily used to equip any of the places enumerated in the definition. What they are designed for, as all the witnesses testified, are people, disabled people who, for whatever reason, have very limited or severe involvement in the lower extremities and in the upper extremities to an extent that they cannot propel the hand rims on a standard self-propelled wheelchair. (R. 46.) Defendant's statement that given the design and speed limitations of the imported motorized wheelchairs they must be and are used within the structures and limited areas surrounding the structures set forth in the TSUS definition of "furniture" does not, as it is meant to suggest, establish that they are used to equip the places described in the definition.

Defendant's alternative claim, that the imported motorized wheelchairs are classifiable as furniture, designed for hospital and medical use (TSUS item 727.04), is inapplicable for substantially the same reasons. Motorized wheelchairs are designed for use by disabled people. There is no evidence that they are designed for use in hospitals nor that they are used by a doctor in the practice of medicine.

Defendant contends, with respect to its burden of proof on the alternative claim, that it is enough that the record establishes that motorized wheelchairs are usually sold by firms in the business of selling medical equipment; also that they are medically prescribed for patients who, for whatever reason, cannot or should not use a self-propelled wheelchair. That proof, however, is not probative of

what this court has held, namely, that the term "furniture" embraces only such articles as are expressly described therein which, for purposes of this case, means articles designed and used to equip hospitals, medical offices, and the like.[1] Brussels Nomenclature heading 94.02, which defendant concedes is strikingly similar to TSUS item 727.04, supports this view in its comment of the heading as follows:

> 94.02—MEDICAL, DENTAL, SURGICAL OR VETERINARY FURNITURE (FOR EXAMPLE, OPERATING TABLES, HOSPITAL BEDS WITH MECHANICAL FITTINGS); DENTISTS' AND SIMILAR CHAIRS WITH MECHANICAL ELEVATING, ROTATING, OR RECLINING MOVEMENTS; PARTS OF THE FOREGOING ARTICLES.
>
> (A) FURNITURE DESIGNED FOR VETERINARY, MEDICAL, SURGICAL, OR DENTAL PRACTICE
>
> This includes:
>
> * * * * * * *
>
> (10) Stretchers and trolley-stretchers for moving patients inside hospitals, clinics, etc. *Invalid carriages used to carry invalids in the street are excluded* (Chapter 87). [Emphasis added.] [Brussels Nomenclature (1955), volume III, pages 1147–1148.]

The testimony in this case additionally establishes that the motorized wheelchairs in this case [2] are lightweight portable wheelchairs; that they can proceed to speeds up to four miles per hour; that they are used both indoors and outdoors; that, except for crossing streets and intersections, they are suitable for highway or street travel as such; that the chairs give people who cannot walk a certain amount of independence and ability to get from place to place without assistance, and that:

> The basic frame is of aluminum construction and is equipped with two drive wheels. Each wheel has its own gear box and electric motor. The power source is from a wet lead acid battery which is supported on the frame or chassis, and the control is effected through a control box either mounted on the left-hand or right-hand side. The control box is designed to give a function of direction, speed, and braking. The frame is equipped with a PVC material seat which the user would sit upon and a back rest. [R. 9.]

The above testimony together with the actual material in evidence,[3] in my opinion, establishes that the imported wheelchairs are in the unlimited tariff sense provided for in TSUS—"Motor vehicles * * *

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[1] Defendant's brief, page 30, footnote 10.

[2] Exhibit 1 has a rear-wheel drive; exhibit 2 has a front-wheel drive.

[3] Exhibit 1 – advertisement showing picture of the A-BEC 14 motorized wheelchair.
Exhibit 2 – advertisement showing picture of the A-BEC 12 motorized wheelchair.
Exhibit 3 – illustration of a motorized wheelchair.
Exhibit 4 – frontispiece and page 67 of magazine entitled "Accent on Living".

for the transport of persons". Defendant has argued they are not highway motor vehicles and require no highway registration. On that point, it is enough that the tariff classification does not specify motor vehicles for the transport of persons on highways or motor vehicles duly registered for highway travel.

I might note that the administrative rulings of the Treasury Department on vehicles of special design and purpose in the manner of the imported motorized wheelchairs support my own conclusion (*Lyons Export & Import, Inc.* v. *United States*, 59 CCPA 142, 145, C.A.D. 1056, 461 F. 2d 830, 832 (1972)), viz: 2 Cust. Bull. 271, T.D. 68–133(11) (1968):[4]

> *Motor vehicles. Golf trolley.*—An automatic self-propelled electric golf trolley, fitted with a 12 volt battery and electric motor providing a two-speed forward movement and resembling in appearance the conventional golf cart, is classifiable under the provision for Motor vehicles (except motorcycles) for the transport of persons or articles: * * * Other, in *item 692.10*, TSUS. * * *

Plaintiff's claim under TSUS item 692.10 is sustained. Judgment will enter accordingly.

(C.D. 4721)

The Bendix Corporation *v.* United States

Bicycle parts and ignition equipment

Constructed Value/Cost of Production—General Expenses and Profit—Coaster Brakes—Common Meaning—Presumption of Correctness

Single-speed bicycle rear wheel hubs incorporating brakes and automotive ignition contact sets exported from Mexico between April and May, 1973, and, in the case of the wheel hubs, appraised on the basis of constructed value as defined in 19 U.S.C.A., section 1401a(d) at U.S. $2.6554 each, including U.S. $0.2131 each for United States parts and classified in liquidation as bicycle parts under TSUS items 807.00/732.36 at the duty rate of 15%, and, in the case of the contact sets, appraised on the basis of cost of production as defined in 19 U.S.C.A., section 1402(f) at U.S. $0.6936 each, including U.S. $0.2283 each for United States parts, plus $1,000 for research and development and classified in liquidation as other electrical starting and ignition equipment for internal

[4] See also, 4 Cust. Bull. 299, T.D. 70-130(3) (1970), rulings on passenger vehicle for off-highway use; 3 Cust. Bull. 531, T.D. 69-209(18)(1969); 101 Treas. Dec. 437, T.D. 66-157(24)(1966), ruling on a vehicle in the configuration of a child's scooter, designed to carry one or two persons around a plant, operated on a rechargeable battery; 100 Treas. Dec. 826, T.D. 56535(112) (1965), ruling toboggan-type vehicles are classifiable as motor vehicles "as the term 'vehicle' encompasses any moving support or container for the conveyance of persons or articles"; 101 Treas. Dec. 292, T.D. 66-94(18) (1966), ruling on metal shopping carts similar to those used in supermarkets and grocery stores. ORR Ruling 632-69, December 24, 1969, Bureau File TE 536 V, July 7, 1969, ruling "electro drive" wheelchairs classifiable under item 692.10 TSUS.

combustion engines under TSUS items 807.00/683.60 at the duty rate of 4%, *held*, (1) to be properly appraised in the absence of evidence establishing that disputed additions to the element of general expenses [consisting of start-up and preproduction costs and research and development costs] and to the element of profit, are not part of the usual general expenses and profit added by Mexican producers of merchandise of the same general character for exportation to the United States or by Mexican producers of *such* and *similar* merchandise and, (2) to be properly classified under item 732.36 in the case of the wheel hubs, in the light of the evidence establishing that the braking mechanism in the wheel hubs was commonly known as coaster brakes and not as drum brakes as claimed by the importer who sought duty-free classification thereof under the TSUS item 912.10 provision for drum brakes.

Court No. 74-9-02469

Port of Laredo

[Dismissed.]

(Decided November 30, 1977)

Barnes, Richardson & Colburn (*Joseph Schwartz* and *James Caffentzis*) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Herbert P. Larsen* and *William F. Atkin*, trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise in this case is covered by five entries. Entries 122939, 123348, 121566, and 120305 consist of single-speed bicycle wheel hubs incorporating brakes which were exported from Mexico in April and May, 1973, appraised, upon entry at Laredo, Texas, at U.S. $2.6554 each, including U.S. $0.2131 each for United States parts, packed, on the basis of constructed value as defined in 19 U.S.C.A., section 1401a(d) (section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956), and classified in liquidation under items 807.00 and 732.36, TSUS, as parts of bicycles other than frames at the duty rate of 15 *per centum ad valorem*. It is claimed by plaintiff-importer that the proper constructed value of the imported hubs is the appraised value less any amount included by the district director for start-up and preproduction costs and profit, less the value of U.S. components as appraised, and that the brakes are properly classifiable under items 807.00 and 912.10, TSUS, as drum brakes, duty free. Item 912.10 classification provides for the temporary suspension of duties on certain bicycle parts, provided for in item 732.36, including drum brakes, when entered or withdrawn for consumption on or after January 13, 1971 and up to and through December 31, 1973.

Entry 122846 consists of automotive ignition contact sets which were exported from Mexico on or about May 7, 1973, appraised,

upon entry at Laredo, Texas, at U.S. $0.6936 each, including $0.2283 each for United States parts, packed, plus $1,000 for research and development, on the basis of cost of production as defined in 19 U.S.C.A., section 1402(f) (section 402a(f), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956),[1] and classified in liquidation under items 807.00 and 683.60, TSUS, as other electrical starting and ignition equipment for internal combustion engines at the duty rate of 4 *per centum ad valorem*. Plaintiff claims that the proper cost of production value of the imported contact sets is the appraised value less U.S. $0.1313 each included for start-up and pre-production costs, with resulting adjustment made in the statutory minimum addition for profit from U.S. $0.0500 each to U.S. $0.0395 each, and less the value of U.S. components as appraised, and less $1,000 added for research and development. No classification issue is raised with respect to the ignition contact sets.

Turning first to the appraisement issues, it is appropriate to set out at length the applicable valuation statutes which read:

Constructed Value

Section 402(d), Tariff Act of 1930, as amended:

> (d) For the purposes of this section, the constructed value of imported merchandise shall be the sum of—
>
> (1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;
>
> (2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and
>
> (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

[1] Finished automobile parts are among the imported articles required to be appraised under the old valuation provisions of 19 U.S.C.A., section 1402 (section 402a, Tariff Act of 1930, as amended) in accordance with T.D. 54521.

Cost of Production Value

Section 402a(f), Tariff Act of 1930, as amended:

> (f) For the purpose of this subtitle the cost of production of imported merchandise shall be the sum of—
>
> (1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;
>
> (2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;
>
> (3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and
>
> (4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

On this phase of the case the record consists of an affidavit received in evidence as exhibit 1, and the testimony of two witnesses. In exhibit 1, Luis Guadalupe Salman Gonzalez, a cost accountant in the employ of Bendix Mexicana, S.A. of San Luis Potosi, Mexico, avers that he prepared cost of production figures relating to the imported merchandise on the basis of data contained in the company's books and records of which he is in charge. Exhibit 1 sets forth labor and material costs, general expenses and overhead, and costs for containers and coverings, etc. for the ignition parts and hubs in issue. Under the heading Ignition Parts (Contact Sets) exhibit 1 states:

* * * * * * *

> The usual general expenses or overhead in producing the ignition parts (contact sets) was $0.0721. . . . No profit was realized on the sale of the ignition parts (contact sets). . . .

And under the heading Bicycle Brakes exhibit 1 states:

* * * * * * *

> The general expenses incurred by Bendix Mexicana, S.A. in producing the bicycle brakes for shipment to the United States was U.S. $0.555 per unit. . . . No profit was realized in connection with the sale of the bicycle brakes.

Eugene H. Neuendorf, controller of plaintiff's bicycle and ignition components division, testified that start-up costs involved the costs to set up machines and tooling, and training personnel to run the machinery in Mexico. The witness characterized these costs as irregular or nonrecurring, and did not consider them to be part of the usual general expenses incurred in producing the subject merchandise. However, the witness had supplied data concerning such costs to customs in response to its request for additional information.

The witness testified that Bendix Mexicana made no profit on the transactions involving the importations at bar inasmuch as the cost of producing the merchandise was higher than the final selling price in the United States, a circumstance he attributed to lower selling prices of Japanese and German competitors in the United States.

It was brought out through this witness that an exchange of correspondence between the witness and five other Mexican manufacturers of the subject merchandise relative to their general expenses and profit disclosed that such information was nonexistent by reason of lack of sales for exportation to the United States by those manufacturers.

On cross-examination Mr. Neuendorf was unable to explain how costs of tooling and moving of machinery for the production of contact sets to Mexico were accounted for, and he pointed out that start-up costs continued to be incurred some 11 months after commencement of production by Bendix Mexicana. He also stated that plaintiff budgeted a certain amount of money yearly for research and development of products but was unaware if there had been any improvements in the contact sets since their initial development.

Mr. Neuendorf further testified on cross-examination that start-up and preproduction costs were costs of doing business and would have the effect of diminishing profits. He stated that Bendix Mexicana's losses were in part due to the preproduction and start-up costs and to the royalty it pays plaintiff. However, Mr. Neuendorf was not sure how the royalty expenses were being accounted for by Bendix Mexicana. Neither did he know the elements that were included in Bendix Mexicana's figure for general and administrative expenses. He testified that he relied upon the books and records which are kept by Mr. Gonzalez in San Luis Potosi, Mexico for the value information furnished to customs. Plaintiff relied upon information furnished by Gonzalez to Bendix Mexicana which in turn was submitted by it to customs.

Dr. Leslie L. McNelis, professor and director of the division of accounting at the University of Texas at San Antonio with experience as a certified public accountant, testified that part of the reason for Bendix Mexicana's losses would be the royalty payments. And he explained that as long as the transfer price from Bendix Mexicana to plaintiff was lower than direct costs to Bendix Mexicana it could

never be reasonably expected to make a profit on the merchandise herein. The witness stated that start-up and preproduction costs had to be accounted for and that the usual way was to capitalize them and charge them off against the product, which apparently was not done in this case. Professor McNelis was of the opinion that general expenses which did not include start-up and preproduction costs would be inaccurate.

The witness also was of the opinion that if current research costs were being incurred they should be included in the general and administrative expenses of a company. The witness pointed out that since Bendix Mexicana was totally owned by plaintiff, plaintiff could dictate the price at which the captive company's goods were transferred to it, and thereby determine the profitability or unprofitability of the captive company's operation.

It was established in the record that customs had rejected *pro tanto* value information regarding this merchandise which was furnished by Bendix Mexicana through plaintiff, and thereafter made the additions thereto to which the testimonial evidence was addressed.

Plaintiff argues that although start-up costs represent expenditures that were incurred in establishing the assembly plant, such costs are not directly or indirectly chargeable to the cost of producing the product, but a capital expense to be regarded as an extraordinary expense and as such not included in the category of usual general expenses. Plaintiff further contends that no addition for profit should have been made in the ascertainment of the constructed value of the wheel hubs inasmuch as Bendix Mexicana was the only manufacturer of such merchandise in Mexico for exportation to the United States, and could not have made a profit on its export transactions to the United States. Plaintiff argues, "The relationship between two parties was not the determining factor on the question of whether a profit was to be made. It appears that the sole reason for disregarding the cost information submitted by Bendix Mexicana was based upon the fact that its sales for export to the United States were to a related party." Also, plaintiff contends that the inclusion of research and development costs was not shown to be an ongoing expense but an expense incurred prior to acquisition of the ignition contact set line by plaintiff, and as such, is not properly part of the dutiable value in this case. Plaintiff argues, "There was no evidence introduced lending support to the addition made for research and development."

Defendant contends that the start-up and preproduction costs added in the appraisement of the subject merchandise come within the category of ordinary and usual costs which are properly included in a cost of production and constructed value appraisement. Defendant further contends that the failure of Bendix Mexicana to realize a profit on its export transactions to the United States was properly disregarded by the appraising officer in the ascertainment of a con-

structed value for the wheel hubs because Bendix Mexicana is a wholly-owned subsidiary of plaintiff and its failure to realize a profit is not fairly reflective of the usual profit realized. Defendant also contends that plaintiff failed to prove that the usual costs and expenses of Mexican producers of such and similar merchandise did not include research and development costs.

The court is of the opinion that the evidence fails to overcome the presumption of correctness attaching to the appraisements in issue with respect to the additions made by the appraising officers. There is no question in the court's mind but that items characterized herein as start-up and preproduction costs and research and development costs come within the ambit of ordinary general expenses, which were properly includable in a statutory constructed value or cost of production valuation, and this, irrespective of any difficulty encountered in the allocation of such expense items. See *Oxford University Press, N. Y., Inc.* v. *United States*, 36 CCPA 102, C.A.D. 405 (1949) (involving the allocation of nonrecurring costs of production such as composition, editorial, correction and proofreading, plates, translations, indexing, permission fees and royalties) and *United States* v. *Border Brokerage Co., Inc.*, 66 Cust. Ct. 639, A.R.D. 288 (1971) (involving the allocation of design and development production costs).

In the case of the constructed value formula (wheel hubs) the statutory focus of inquiry respecting such expense items is directed at the foreign expenses of producers of merchandise of the same general class or kind as the merchandise undergoing appraisement. Thus, the presumption of correctness attaching to the appraisement of the hubs presupposes an appraisement based upon a collateral valuation standard insofar as the element of general expenses is concerned. And against this criterion, it is clear that plaintiff's proofs take the wrong approach in the attempted repudiation of this element of the appraisement. The witness Neuendorf solicited, and obtained a negative response from only one Mexican manufacturer of bicycle coaster brakes concerning its general expenses and profit (collective exhibit 8) and did not establish in his testimony that this response came from the only other Mexican coaster brake manufacturer besides Bendix Mexicana. Moreover, no inquiry was directed at the ascertainment of the general expenses of Mexican manufacturers of *other bicycle parts* in keeping with the breadth of the statutory mandate. Consequently, plaintiff's proofs fall short of repudiating the presumed existence of start-up and preproduction costs in the general expenses of Mexican producers of merchandise of the *same general class or kind* for exportation to the United States and in the amounts returned in the appraisements at bar.

The same is true with respect to the item of 8% profit added to the element of general expenses in the appraisement of the wheel hubs

irrespective of the fact that Bendix Mexicana's operations were represented to the appraising officer as being profitless. And it is not a case of whether the appraising officer rejected Bendix Mexicana's statement of profit loss by reason of its subsidiary relationship to plaintiff as both parties seem inclined to speculate about, especially in view of the fact that the subsidiary's cost figures had been accepted at least in part by the appraising officer. No evidence has been adduced in the record by either party as to the appraising officer's attitude concerning the subsidiary's profit loss statement to support speculation in the matter either way. Hence, here too, as in the case of the items of start-up and preproduction costs, it must be presumed that the added profit figure reflects the amount added by other Mexican manufacturers of bicycle parts, if not coaster brakes. See *N. M. Albert Co., Inc., et al.* v. *United States*, 62 Cust. Ct. 1029, 1033, A.R.D. 254 (1969). This presumption remained wholly unrebutted by plaintiff's insufficient proofs. As defendant aptly noted, plaintiff's inquiry of only one manufacturer was inadequate to establish due diligence, and Bendix Mexicana's actual figures for general expenses and profits cannot be taken as establishing constructed value. (Defendant's brief, pp. 33–34)

In the case of the cost of production formula (contact sets) plaintiff did not adduce any evidence to establish that the item added by the appraising officer for research and development was associated with the P & D (Piffath & Danziger) operation prior to its takeover in 1966 by plaintiff. Plaintiff did not elect to call the appraising officer to testify in regard to this item. And although the witness Neuendorf was aware that plaintiff maintained an annual budget for research and development, he was unable to state whether there had been any improvements made in the contact sets since their initial development, or even if there had been any cost to plaintiff for acquisition of the company producing the contact sets. Moreover, letters of inquiry authored by Neuendorf (exhibits 5, 6, 7, 9,) indicate that there were at least four, if not more, Mexican producers of *such* or *similar* merchandise in addition to Bendix Mexicana.[2] Thus, the general expenses to be added in view of the state of this record are not those of the manufacturer *per se*, but rather the usual general expenses incurred in the production of "such or similar merchandise". *United States* v. *Henry Maier*, 21 CCPA 41, 46, T.D. 46378 (1933). Consequently, the court agrees with the defendant that the action taken

[2] The criteria considered here need not involve production of merchandise for exportation to the United States as in the case of the more limited constructed value appraisements. Hence, what this court heretofore said with respect to the presumed inclusion of start-up and preproduction costs *vis-a-vis* appraisement under the constructed value formula (wheel hubs) applies with greater force to the presumed inclusion of start-up and preproduction costs *vis-a-vis* appraisement under the cost of production formula (contact sets). The court mentions this only because plaintiff's argument against inclusion of such items of cost is directed against both valuation formulas.

by the appraising officer in making this addition is presumed to be correct in the absence of proof that research and development costs [and start-up and preproduction costs as well, for that matter,] were not a usual cost or expense incurred by Mexican manufacturers of *such* or *similar* merchandise. Plaintiff produced no such evidence in this case.

The court turns now to the classification issue in the case that involves only the rate of duty assessed against importations of wheel hubs which have been invoiced as bicycle drum brakes.

E. Elliott Hood, manager of engineering in the bicycle product line of plaintiff's bicycle and engine components division, testified that he has been with plaintiff for 45 years and was the inventor of the imported merchandise which he referred to as a "redesign of the original Bendix coaster brake". Mr. Hood explained that with the exception of a few changes in appearance the imported brake is the same brake as that which was produced domestically by plaintiff between 1970–1972. The witness described the operation of the imported brake in some detail. The brake is activated by backpedaling which applies motion resulting in expansion of two brake shoes against the inside of the hub. The resulting friction produces the braking effect.

The witness also described the operation of a coaster brake which does not employ brake shoes (exhibit 13), known as a multiple disc-type coaster brake. According to the witness' testimony, the multiple disc coaster brake employs a series of discs located in the hub, some fixed and others rotating freely, which are compressed by backpedaling to produce the braking effect. With respect to the nomenclature of imported brakes, Mr. Hood testified (R. 82):

> Q. Will you tell us whether, in your opinion, the brakes involved in this case are drum brakes?—A. The brake involved in this case, in my opinion, is a drum-type brake.
>
> Q. And why do you say that?—A. Primarily because the drum-type brake could be pretty well defined, and a bit of research with the bigger Bendix division in South Bend—because there are automotive-type brakes or automotive caliper brakes—A drum-type brake, in their classification, is pretty much a shoe-type brake, where the shoes are expanded outwardly against the inside diameter of a rotating drum.
>
> Q. Can the brake in question also be called a coaster brake?—A. The brake in question can be called a coaster brake, although I truly don't know why. But it is a term that has been used in the bicycle industry for a great number of years.

On cross-examination Mr. Hood testified that if he were to ask for a coaster brake in a bicycle shop he would probably be given the imported brake (exhibit 11) and the multiple disc-type brake (exhibit 13). It was also brought out on cross-examination of the witness that from 1970 until the transfer of production facilities to Mexico, plain-

tiff was the sole domestic manufacturer of the coaster brake, and that both before and after the transfer of production facilities to Mexico plaintiff advertised the imported brakes in trade journals as "coaster brakes". Also, Mr. Hood identified a copy of a patent issued in his name for the imported merchandise (exhibit B) in which reference is made to the brake as a "coaster brake". However, Mr. Hood explained that the decision to call it a coaster brake was made by the patent attorney.

On redirect examination Mr. Hood testified that he knew that there are French and Japanese sources that market a drum brake and advertise it as such. He described the operation of the French drum brake which is in evidence as exhibit D. According to the witness exhibit D functions by means of a handlebar cable control operating on an external level which rotates a cam that expands two brake shoes revolving around a common pivot against the inside of a drum.

John Forester, an industrial engineer by profession, and a bicycle enthusiast, author, professor and consultant in the area of bicycle traffic engineering, testified that a drum brake is a brake which, like an automobile brake, has shoes located internally to a drum. The shoes, which usually consist of asbestos and an organic binder, are attached inside the drum but outside of the hub shell and entirely separate from the lubricated workings of the hub shell Drum brakes are usually activated by a cable, but sometimes by a rod. According to Mr. Forester exhibit D is a rear drum brake and would be so identified in a bicycle shop. The witness testified that drum brakes were not produced domestically during the period from 1970 to the present time.

Mr. Forester identified the imported brakes (exhibit 11) and the multiple disc brake (exhibit 13) as coaster brakes while being aware of the differences in their construction. He stated that he had never seen a consumer, an advertisement, a bicycle shop, or a trade journal refer to a coaster brake as a drum brake. He testified that in his lifetime of experience with bicycles he had never heard anyone other than Mr. Hood refer to exhibit 11 as other than a coaster brake.

Plaintiff contends that due to the fact that the imported merchandise contains brake shoes which expand against a rotating hub or drum it is proper to consider them, in terms of their braking mechanism, as a drum-type brake. Plaintiff further contends that classification of the imported merchandise as drum brakes is consistent with the congressional purpose underlying item 912.10 to aid the competitive position of American bicycle manufacturers, in view of the established fact that domestic production of bicycle brakes is nonexistent.

Defendant contends that the imported brakes are commonly known as coaster brakes. Defendant also contends that Congress did not in-

tend to include the imported coaster brakes under item 912.10 classification.

The court agrees with defendant. The evidence in the record is overwhelming that the braking mechanism in the imported wheel hubs is commonly known as a bicycle coaster brake. Moreover, plaintiff's witness Hood didn't even consider the braking mechanism in the imported merchandise to be a "drum brake" *per se*. At best he considered the braking mechanism to be a *drum-type* brake, and this only because it operates on the "expanding-shoe-type principle", to use his words. However, it is well settled that tariff terms are not drafted in accordance with their technical and scientific meaning but in accordance with their commercial and common meanings. See *Meyer & Lange et al.* v. *United States*, 6 Ct. Cust. Appls. 181, T.D. 35436 (1915); *Central Commercial Co. et al.* v. *United States*, 11 Ct. Cust. Appls. 131, T.D. 38935 (1921); *Chester K. Stoner* v. *United States*, 42 Cust. Ct. 178, C.D. 2083 (1959). And since the braking mechanism at bar is commonly known as a coaster brake, and is not commonly known as a drum brake, it was properly classified under the broad provision for bicycle parts in item 732.36, there being no provision in item 912 10 for coaster brakes *per se*.

In fact, the legislative history underlying item 912.10 reveals that Congress enacted the statute so that domestic bicycle manufacturers could compete more favorably with their foreign counterparts by importing duty free various parts not manufactured in this country. See 3 U.S. Cong. & Admin. News '70, pp. 6115–6116; coaster brakes *per se* were excluded from the measure since they were then being manufactured in this country. In this connection the Senate Finance Committee Report [S. Rept. No. 91–1536 on H.R. 19670, 91st Cong., 2d Sess. (1970)] states:

> The committee is informed that with the exception of coaster brakes and click stick levers the parts and accessories imported under TSUS item 732.36, on which the duty would be suspended temporarily, are not produced domestically. With regard to coaster brakes, which are produced in the United States, the bill would assure that only coaster brakes that are physically joined to three-speed hubs would be accorded duty-free entry. . . .

Hence, the imported wheel hubs at bar which incorporated the coaster brakes in dispute are of the single speed variety, and as such, were never intended to be accorded the duty exemption provided for in item 912.10.

For the reasons stated plaintiff has failed to sustain the issuable allegations of the complaint, and the action must, therefore, be dismissed. Accordingly, on the reappraisement issues the court finds as facts:

1. That the merchandise in this action consists of single-speed bicycle rear wheel hubs incorporating coaster brakes and automotive

ignition contact sets exported from Mexico between April 4, 1973 and May 7, 1973.

2. That said merchandise was appraised upon entry at the port of Laredo, Texas, (a) as to the wheel hubs, on the basis of constructed value as defined in 19 U.S.C.A., section 1401a(d) (section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) at U.S. $2.6554 each, including U.S. $0.2131 each for United States parts, and (b) as to the contact sets, on the basis of cost of production as defined in 19 U.S.C.A., section 1402(f) (section 402a(f), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) at U.S. $0.6936 each, including U.S. $0.2283 each for United States parts, plus $1,000 for research and development.

3. There is no evidence in the record that the items of start-up and preproduction costs and profit, in the case of the wheel hubs, and the items of start-up and preproduction costs and research and development costs, in the case of the contact sets, were improperly added in the appraisement of said merchandise.

Upon these facts the court concludes as matters of law:

1. That constructed value as defined in section 1401a(d) and cost of production as defined in section 1402(f) are the proper bases for determination of the values of the merchandise herein.

2. That plaintiff has not established a constructed value or a cost of production value different from that returned in the appraisement of said merchandise.

3. That the appraised values of said merchandise remain in full force and effect by reason of plaintiff's failure to overcome the presumption of correctness attaching to the appraisements herein.

Judgment will be entered accordingly.

(C.D. 4722)

RUSS TOGS, INC. *v.* UNITED STATES

Opinion and Order on Defendant's Motion to Sever and Dismiss and to Extend the Time to Answer the Complaint

Court No. 75-5-01106

Port of New York

[Motion granted.]

(Dated December 8, 1977)

Serko & Simon, Esqs. (*Margaret H. Sachter* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Wesley K. Caine*, trial attorney), for the defendant.

1.

NEWMAN, Judge: Defendant has moved for an order severing entry numbers 314062 and 154009 covered by this civil action and dismissing said action as to those entries for lack of jurisdiction. The predicate of this court's lack of jurisdiction, as advanced by defendant, concerns the alleged invalidity under 19 U.S.C. § 1514(b)(1) of the second protests filed in connection with each of the above entries, respecting the same category of merchandise as was the subject of the prior protests.

Additionally, defendant has requested an extension of time to and including 30 days after the entry of an order herein within which to answer the complaint.

Plaintiff has interposed an opposition to the motion to sever and dismiss, but does not oppose that branch of defendant's application for an extension of time to answer the complaint.

For the reasons indicated herein, defendant's motion is granted.

Briefly, the pertinent facts leading to the present controversy are:

On August 9, 1973, two protests (Nos. 1001–3–011948 and 1001–3–011949) were filed on behalf of plaintiff challenging respectively the classification and the appraisement of certain merchandise (jackets) in entry No. 314062. The first protest (No. 1001–3–011948) was the subject of Court No. 75–5–01105,[1] while the second protest (No. 1001–3–011949) is the subject of the instant civil action.

On February 14, 1974, two protests (Nos. 1001–4–001636 and 1001–4–001637) were filed on behalf of plaintiff challenging respectively the classification and appraisement of the jackets in entry No. 154009. The first protest (No. 1001–4–001636) was the subject of Court No. 75–5–01105, while the second protest (No. 1001–4–001637) is the subject of the instant civil action.

From the foregoing facts, it is apparent that each of the entries sought by defendant to be severed is the subject of two separate protests, which were in turn the subject of separate civil actions; and that it is the second protests that are covered by the instant action.

In support of its motion for severance and dismissal of this action respecting entry numbers 314062 and 154009, defendant asserts that the court lacks jurisdiction of the *second* protests (Nos. 1001–3–011949 and 1001–4–001637), inasmuch as they contravene the one protest per entry rule in 19 U.S.C. § 1514(b)(1). This statute, so far as pertinent, reads:

> * * * *Only one protest may be filed for each entry of merchandise*, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category.

[1] This action was abandoned on May 13, 1977 and dismissed on May 24, 1977.

> In addition, separate protests filed by different authorized persons with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest. * * * [Emphasis added.]

Defendant insists that since the second protests covering entries 314062 and 154009 do not fall within the exceptions to the one protest per entry rule in section 1514(b)(1), "this case should be dismissed as to the merchandise covered by those jurisdictionally defective protests", citing this court's decision in *Minox Corporation d/o Berkey Photo, Inc.* v. *United States*, 77 Cust. Ct. 110, C.D. 4680 (1976).

In opposition to defendant's motion for severance and dismissal, plaintiff argues that "the two protests for each entry were filed at the same time on the same day and stamped in sequence"; that the difference in time between filing the first and second protests "a few seconds at most, would appear to be *de minimis*"; and that the second protests were "later" than the first protests only by virtue of the "chance of the order in which they were stamped in". Plaintiff also urges that the purpose of the single protest rule in section 1514(b)(1) is to avoid separate litigation of different issues arising out of a single entry comprising a single category of merchandise; and that since Court No. 75–5–01105, covering the classification protests filed first (Nos. 1001–3–011948 and 1001–4–001636), has been abandoned by plaintiff, the second protests concerning appraisement constitute the only protests to be litigated before the court respecting entries 314062 and 154009.

2.

Central to the resolution of the jurisdictional issue presented here is the Congressional intent manifested in the one protest per entry rule in section 1514(b)(1).

Prior to the modernization of procedures in 1970 relating to judicial actions and administrative proceedings in customs matters by P.L. 91–271 (84 Stat. 274), there was no statutory bar to the filing of multiple protests respecting the same entry of merchandise. Moreover, appraisement and classification issues presented in a single entry were required to be litigated separately. These mandated separate proceedings for contesting appraisement and classification were regarded as one of the major defects in the prior statutory procedures. Thus, the Senate Committee on the Judiciary reported to the Senate (S. Rep. No. 91–576, 91st Cong., 1st Sess. 10 (1969)):

> The major defects in present statutory procedures include the following:
>
> > If both questions of appraisement and classification are presented in a single entry of merchandise, the importer cannot have all issues resolved in a single proceeding. Instead, he must first contest the appraisement issue.

> Only after this issue has been finally determined by the courts, may he contest the classification of the merchandise.

To remedy the procedural defect mentioned above, the Senate Committee recommended (S. Rep., *supra*, at page 12):

> 9. There will be a single judicial proceeding in which all issues, including both appraisement and classification, will be considered. * * *

This recommendation was based on the following guideline (S. Rep., *supra*, at page 11):

> 1. There should be a *single, continuous* procedure for deciding all issues in any entry of merchandise, including appraisement and classification issues. [Emphasis added.]

In view of the legislative background cited *supra*, it is apparent that one of the principal concerns of Congress in enacting P.L. 91–271 was to avoid piecemeal administrative processing and subsequent litigation of different issues pertaining to the same entry of merchandise; and it is beyond peradventure that Congress did not desire the filing of separate protests contesting classification and appraisement for the same category of merchandise in a single entry.

To effectuate the Congressional intent in the one protest per entry rule on section 1514(b)(1), I am clear that only the *first* protest received by customs for filing may practicably be treated as valid. The filing of multiple protests challenging different administrative decisions in a liquidation (viz., classification, appraisement, etc.) regarding the same category of merchandise in a single entry is plainly inimical to the objective of the statute seeking to streamline the administrative and judicial review of customs decisions. Here, in the two entries sought to be severed by defendant (Nos. 314062 and 154009), plaintiff separately contested the classification and appraisement decisions respecting a single category of merchandise (jackets) by the filing of dual protests, a practice which Congress envisioned and intended would be specifically prohibited in section 1514(b)(1). There is no indication whatsoever in the dual protests that they were intended to amend each other so that each protest would cover both the classification and appraisement issues, as asserted by plaintiff—undoubtedly an afterthought. See also 19 C.F.R. § 174.14.

Plaintiff's argument, that the second protests do not violate the one protest per entry rule of section 1514(b)(1) because the civil action covering the first protests (Court No. 75–5–01105) was abandoned, is totally without merit. The statute evinces Congressional concern with the *filing* of multiple protests, and not with what action a protestant may or may not decide to take in the course of future litigation. Obviously, neither an efficient administrative nor judicial review can practicably await a protestant's option as to which of several multiple protests or civil actions filed will be abandoned. Hence, the fact that

plaintiff ultimately abandoned Court No. 75–5–01105 covering the first protests challenging the classification decisions in entries 314062 and 154009 cannot be deemed to retroactively validate the proscribed second protests covered by this action challenging the appraisement decisions.

Further, there is no merit in plaintiff's argument which infers that the statute does not mean what it says about filing one protest per entry where, as here, the dual protests were filed consecutively on the same date. Plaintiff urges that under these circumstances, the dual protests should be deemed by the court as parts of a single protest. However, I can discern no basis in the statute for the Customs Service or the Customs Court to deem separate protests as parts of a single protest, except where the separate protests are filed by *different authorized persons*,[2] which is not the situation here.

The other exception to the one protest per entry rule in section 1514(b)(1), permitting the filing of separate protests *where an entry covers merchandise of different categories*, has no applicability in this case, since the dual protests covering each of the entries sought to be severed concern merchandise of the same category, viz., jackets. The fact that the first and second protests challenge different administrative decisions (e.g., classification and appraisement) does not bring the dual protests within the exception in section 1514(b)(1) for separate protests covering different categories of merchandise. Thus, in *Minox* this court observed with reference to the one protest per entry rule (77 Cust. Ct. at pages 110–11):

> Plainly, the intent of section 1514(b)(1) is to require an importer to present all claims arising out of the liquidation of any entry in a single protest, unless there are different categories of merchandise in the entry, in which event a separate protest may be filed for each category. * * *
>
> * * * * * * *
>
> * * * Nevertheless, it should be emphasized that where, as here, separate protests are filed involving the entry, the plaintiff must comply with the statutory prerequisite that *separate categories* of merchandise be covered by *each* protest. [Emphasis in original.]

In addition to *Minox*, the Customs Court has considered the one protest per entry rule in: *A & A Trading Corp.* v. *United States*, Court No. 74–3–00615; and *Mansubco, Inc.* v. *United States*, Court No. 74–

[2] See also 19 C.F.R. § 174.15 covering: "Consolidation of protests filed by *different parties*" (emphasis added). To the extent that this regulation may be literally read to authorize a *single party* to file multiple protests relating to one category of merchandise covered by an entry, the regulation contravenes the express terms of 19 U.S.C. § 1514(b)(1). The statute is clear that separate protests relating to one category of merchandise may be deemed part of a single protest only where they are filed by *different authorized persons*. Moreover, the court cannot retroactively reconstruct the separate manner in which the protests covered by this action were administratively processed. Rather, the court must deal with the jurisdictional issue in light of the fact that two protests were filed and each protest was treated administratively as separate.

8–02256. In these two cases, defendant moved to dismiss the actions as to certain entries respecting which multiple protests had been filed. In *A & A Trading Corp.*, an order was signed on February 26, 1975 granting defendant's motion to sever and dismiss, while in *Mansubco, Inc.*, an order was signed on March 27, 1975 denying defendant's motion to dismiss.[3] A review of the official papers in those two cases discloses that there, unlike the present case, the multiple protests were filed on different dates. Nevertheless, in my view, the statutory proscription of multiple protests is applicable, irrespective of whether such protests were filed consecutively on the same date, as here, or on different dates. Consequently, I arrive at and follow the same decision in the present case as determined by the court in *A & A Trading Corp.*

In essence, pursuant to 19 U.S.C. § 1514(b)(1) only one protest may be filed for each entry covering the same category of merchandise. Filing a protest in compliance with section 1514(b)(1) is an imperative of this court's jurisdiction because of 28 U.S.C. § 1582(c), which provides: "The Customs Court shall not have jurisdiction of an action unless * * * a protest has been filed as prescribed by section 514 of the Tariff Act of 1930, as amended [19 U.S.C. § 1514] * * *". Here, I find that plaintiff, through the same attorneys, filed two separate protests respecting each of the entries sought to be severed by defendant, and that each of the protests encompasses one and the same category of merchandise. Plaintiff does not contend, and I do not find, that either of the two statutory exceptions to the one protest per entry rule is applicable herein. Neither the consecutive filing of the dual protests on the same date, nor the subsequent abandonment of the civil action covering the first protests, will serve to authorize the filing of the dual protests. Thus, plaintiff has disregarded the plain meaning of section 1514(b)(1), which limits an importer to filing one protest to contest all administrative decisions arising out of an entry comprising one category of merchandise.

Plaintiff had two permissible courses of action: a single protest could have contested both the classification and the appraisement of the merchandise in each of the entries; or the first protests could have been amended in accordance with the statutory and regulatory requirements to include both the classification and appraisement issues. But for whatever reason, plaintiff utilized neither of those permissible courses of action. Rather, plaintiff filed dual protests respecting each of the entries and thereby attempted to maintain two proceedings for the potential of refund duty on each entry. In view of the explicit

[3] These orders were issued without opinion and are not reported. Additionally, in *Intercontinental Fibres, Inc.* v. *United States*, Court No. 74-9-02535, defendant's motion to dismiss was granted in an unpublished order without opinion, signed on April 24, 1975; but that order was subsequently vacated without prejudice to defendant, and the case suspended under *Webcor Electronics* v. *United States*, Court No. 73-1-00175, by an order signed on July 8, 1975.

statutory proscription of multiple protests, obviously plaintiff's second protests were improperly filed. The construction of the one protest per entry rule in section 1514(b)(1) urged by plaintiff would amount to nothing less than a judicial rewriting of the statute—and I reject such construction. Accordingly, it is hereby

ORDERED that the instant civil action be severed and dismissed as to the merchandise covered by entry numbers 314062 and 154009; and it is further

ORDERED that the time within which defendant must answer plaintiff's complaint in this action is extended to and including 30 days after this order is entered.

(C.D. 4723)

AMICO, INC. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 73-11-03155

Port of Philadelphia

[Plaintiff's motion denied; defendant's cross-motion granted.]

(Dated December 9, 1977)

Tompkins & Davidson (*Allerton deC. Tompkins* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Sheila N. Ziff*, trial attorney), for the defendant.

MALETZ, Judge: This action which is before the court on cross-motions for summary judgment involves the dutiable status of articles imported from Japan via the port of Philadelphia during the latter part of 1972 which were invoiced as "Lucite Musical Dancing Couple in Plastic Dome" with or without additional words of description. The article itself is composed of a music box mechanism contained in a transparent acrylic box-like container with brass fittings, on top of which is a clear plastic dome covering two miniature figures on a metal pin representing a miniature man and a woman.

The imported articles were classified by the government as toys having a spring mechanism under item 737.80 of the Tariff Schedules of the United States (TSUS) as modified by T.D. 68-9 and assessed duty at the rate of 22% ad valorem.

Plaintiff challenges this classification and contends that the imported articles are properly classifiable as music boxes under item 725.50, TSUS, as modified by T.D. 68-9, and thus dutiable at the rate of 8% ad valorem.

Alternatively, plaintiff claims that the articles should have been severed for classification purposes and that the music box portion, with or without the plastic dome, should have been classified as music boxes under item 725.50, while the figures, with or without the plastic dome, should have been assessed as dolls at 17.5% ad valorem under item 737.20, as modified by T.D. 68–9.

The relevant provisions of TSUS are as follows:

Classified under:

Schedule 7, Part 5, Subpart E:

Subpart E headnotes:

1. The articles described in the provisions of this subpart (except parts) shall be classified in such provisions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules, * * *

* * * * * * *

2. For the purposes of the tariff schedules, a "toy" is an article chiefly used for the amusement of children or adults.

* * * * * * *

	Toys, and parts of toys, not specially provided for:	
737.80	Toys having a spring mechanism	22% ad val.

Claimed under:

Schedule 7, Part 3, Subpart A:

Subpart A headnotes:

1. This subpart does not cover—
(i) articles which are toys (see part 5 of this schedule); * * *

* * * * * * *

	Other musical instruments:	
725.50	Music boxes	8% ad val.

Alternatively claimed under:

Schedule 7, Part 5, Subpart E:

* * * * * * *

737.20	Dolls, and parts of dolls including doll clothing	17.5% ad val.

To the extent relevant to the present motion, the record consists of the pleadings, three affidavits,[1] and two exhibits, one of which (exhibit 1) is a representative sample of the imported "Musical Dancing

[1] The affidavits were executed by Ruth Arch, a Philadelphia, Pa. housewife who purchased, used and observed the use of the imported articles; Stephen R. Mickelberg, vice president in charge of sales of the plaintiff company; and Lorraine Squaresky, assistant to the president of the plaintiff company and supervisor in charge of importing and ordering foreign merchandise.

Couple," while the second (exhibit 2) is a 1972 sales catalogue of the plaintiff company.

From an examination of the sample submitted by plaintiff, it appears that the bottom portion of the merchandise consists of a musical mechanism encased in a clear lucite box almost two and one quarter inches high, with metal fittings. Two small figures, almost two inches long, representing a dancing couple in evening attire, are attached to a metal shaft which is inserted through an opening in the top of the lucite box and touches a small metal platform that is secured to the musical movement. The figures are enclosed in a transparent plastic dome, approximately three inches high, which fits on top of the music box. The music box, the figures and the dome are not permanently affixed and may be disassembled.

The musical movement, *per se*, consists of a metal cylinder with tiny knobs projecting from the surface, two gears and a metal disc with extended strips or teeth. When the movement is put in operation by winding a spring mechanism and pulling a small lever, the cylinder and gears revolve and the metal teeth or strips strike the projecting knobs to reproduce a melody.

At the same time, the metal platform, which is activated by a moving gear attached to the cylinder, moves up and down causing the metal shaft to which the figures are attached to bob up and down. This bobbing action, in turn, gives the figures, whose legs are in motion, the appearance of dancing to the music. The article is imported in a cardboard box bearing the words "Clear Tone Musical Dancing Couple" and "Lucite Handicraft."

I

Against this background, the first issue is whether the imported articles were properly classified by the government as toys. Arguing that the articles are not so classifiable, plaintiff has appended to its motion for summary judgment the three aforementioned affidavits. First, the affiant, Mrs. Ruth Arch, a Philadelphia housewife, stated that she had given the imported articles to her daughters' teenage girlfriends as "Sweet Sixteen" party favors. Stating that she had observed many of the recipients in their homes, she found (Affidavit, p. 2):

> * * * that each girl enjoyed and used her * * * Music Box for pleasure, primarily for its pleasant music appropriate for teenagers, and never was it used for amusement * * * They took delight in playing the music * * * and in expressing their satisfaction for the pleasure (not amusement) it gave to them and * * * others * * *.

Mr. Mickelberg, the vice president in charge of sales of the plaintiff company, stated in his affidavit that the articles were designed to appeal to the romantic inclinations of teenage girls. He said that

he had given the article as gifts to the teenage daughters of his friends and relatives and added that he had never known or seen this music box used for amusement, particularly the kind of amusement provided by playthings. Mr. Mickelberg further stated (Affidavit, pp. 5–6):

> The No. 6145 [the model in issue here] plays a simple waltz, "Dance Ballerina", which was popular in the early 1970's among young ladies, particularly teenagers who enjoy romance and waltz music or old-fashioned dancing. The ornamental revolving (dancing) figures simulate appropriate romantic motion related to the waltz music. (They serve a purpose which can be likened to the purpose served by appropriate costumes and stage settings for an operatic or musical comedy performance). All of these combined things cause the entirety to appeal to teenage young ladies during the time in their lives when romance is important. Our sales were successfully directed to them. Without the dancers, the item would not have the same appeal to this group as a music box. Moreover, the top portions of this article (dancers under a dome) have no useful commercial application when separated from the balance (acrylic container with brass posts). The entirety is designed to be used as an entirety for sale to a particular class of people (teenage girls). If the said top portion were removed, the said bottom portion by itself is not saleable to teenage girls.

Similarly, Ms. Lorraine Squaresky, assistant to the president of the plaintiff company, after first noting that she had seen the article in operation in the homes of friends and relatives, stated that: "It is self-evident that it is not to be played with like a plaything; its purpose is not for the amusement of either children or adults * * *." (Affidavit, p. 4.) Ms. Squaresky also stated in her affidavit (pp. 2–3):

> Attached hereto and marked Exhibit 2 is the 1972 Sales Catalogue issued by Amico, Inc. to the trade at that time for sales purposes. I assisted in the preparation of this catalogue by editing the material to be used, setting up the format and assisting with descriptions. The said No. 6145 Music Box appears on page 7 of this catalogue as "The Dancers". This page is entitled "Musical Gifts by Amico" and depicts 8 different music boxes then being handled by Amico Inc., each of which is purchased and is saleable because its music is directed toward, and the entirety appeals to a certain class of people who enjoy music box music, such as children (The Musical Ferris Wheel Bank with children's music and music box #2210 is designed for children. It also has usefulness in teaching a child to save money), female adults who like birds (#6146 which plays a bird song), lovers (#6061 and #6063, each of which plays a soft romantic song), dancers, particularly teenage girls, the item in dispute (#6145), adult females who enjoy popular tunes in novelty music boxes (#6143, #9822, #9893). * * *
>
> * * * * * * *
>
> The 6145 music box was ordered because it was found to be desired by and appropriate for teen-age girls who liked romantic waltz-type music box music. The song played by the 6145

> mechanism "Dance Ballerina" was in 1972 popular and appropriate for young ladies. The attractive music box containing the the mechanism was that time an unusual combination of clear transparent acrylic (a new plastic material at that time) and brass appealing to the eyes of young ladies, and the revolving figures simulated romantic motion pertinent to the waltz music. All of these things in combination resulted in an attractive music box having an appeal for teen-age girls at a time in their lives when romance was important. I know about such things because I have lived through such a period when I was a teenager.

Relevant in determining whether an article is chiefly used for amusement and thus classifiable as a toy is *United States* v. *Topps Chewing Gum, Inc.*, 58 CCPA 157, C.A.D. 1022, 440 F. 2d 1384 (1971), where the court held that an object was a toy even if it was not a plaything if the purpose of the object was to give the same kind of enjoyment as playthings give, whether the object was to be manually manipulated, used in a game or worn. More specifically in *Topps*, the appellate court concluded that objects variously labeled as "Wise Guy Buttons," "Smarty Buttons", and "Ugly Buttons" were properly classifiable as toys, stating (58 CCPA at 159):

> After noting that prior to the enactment of the TSUS a "toy" was defined as a child's plaything, the [trial] court cited *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967), for the proposition that the TSUS removed the limitation regarding the users' age but left the requirement that the object be a plaything. We think this conclusion is unsupported by the wording of the TSUS or by case authority. In the *Wilson's* case the court did not hold that to be a toy an object had to *be* a plaything, but that the "character of amusement involved was that derived from an item which is essentially a plaything." *Id.* at 39. The court thus stressed the quality of mind or emotion induced by the object as controlling, and we think that is the best approach to interpreting the TSUS definition. *If the purpose of an object is to give the same kind of enjoyment as playthings give, its purpose is amusement, whether the object is to be manually manipulated, used in a game, or, as here, worn. We think the evidence is clear that the fun children derive from wearing the imported buttons is essentially the same kind of frivolous enjoyment they would derive from objects which we commonly think of as toys.* [Emphasis added.]

The parties agree that the sample in the present case is a potent witness. And with the teaching of *Topps* in mind, plaintiff contends that the sample demonstrates that the imported article is incapable of giving the same kind of enjoyment playthings give, while the defendant maintains that it is manifest from the sample that the pleasure teenagers derive from the operation of the article is essentially the same character as the amusement derived by children from playthings such as wind-up toys which move and emit sound when the spring mechanism is wound. On this question, we must agree with

the plaintiff. For an examination of the sample without more is persuasive that the importation does *not* give the same kind of "frivolous enjoyment" one would derive from objects commonly thought of as toys.

It is true that the government's classification enjoys the benefit of the presumption of correctness. However, this presumption of correctness may be overcome by the probative effect of the sample itself. E.g., *United States* v. *Bruce Duncan Co., Inc., et al.*, 50 CCPA 43, 46, C.A.D. 817 (1963). And on this score, the sample in the present case—a description of which has been set forth before—is sufficient by itself to overcome this burden. In addition, we have the uncontradicted affidavits of three persons making clear the kind of enjoyment teenagers obtain through use of the imported articles—an enjoyment which the court must conclude is scarcely the same kind of enjoyment as playthings give.

II

It is of course basic that even though plaintiff has proven the government's classification to be erroneous—as it has—plaintiff has the further burden of proving the correctness of its own claimed classification. This being the case, plaintiff must show that the imported article is a "music box" within the meaning of item 725.50. Defendant, on the other hand, claims that the article is "more than" a music box. On this aspect, plaintiff argues that the article is nothing more than an attractive music box and that the dancing couple merely enhances the features of attractiveness, making the article suitable as a music box to a particular class of people. In short, according to plaintiff, the article has no secondary function which might warrant the application of the "more than" theory. Defendant, to the contrary, argues that the importation is not just another version or model of a music box, but rather that it is *more* than a music box by reason of the presence of the dancing couple, and that the article therefore is not classifiable as a music box under item 725.50, as claimed by plaintiff.

"It is well settled that merchandise which in fact constitutes more than a particular article or which has *additional nonsubordinate* or *co-equal* functions is not classifiable as that article." [Emphasis added.] Sturm, *A Manual of Customs Law* (1974), p. 298, and cases cited. Put otherwise, "[t]here has recently been a spate of cases in the Customs Court involving the 'more than' doctrine. It has been applied in cases where the article was found to have two coequal functions or *where a second function was not incidental, subsidiary or auxiliary.*" Sturm, *A Manual of Customs Law* (Supp. 1976), p. 72.

The question, therefore, is whether the dancing couple provides an incidental or subsidiary function, as argued by plaintiff, or whether

the dancing couple provides a nonsubordinate function, i.e., a function which is not incidental or subsidiary, as argued by defendant. For the reasons that follow, the court concludes that the function of the dancing couple is not incidental or subsidiary and that the imported articles are therefore "more than" music boxes.

The question of what constitutes a music box has been before this court on several occasions. In *I. Pukel* v. *United States*, 60 Cust. Ct. 672, C.D. 3497 (1968), the court considered the common meaning of that term and stated (p. 675):

> * * * We conclude that a "music box" is a small mechanical movement playing tunes automatically, which is incorporated into a box, case, or cabinet. Instructive is the following definition set out by this court in *Cody Manufacturing Co., Inc., et al.* v. *United States*, 33 Cust Ct. 377, 378, Abstract 58428 (1954), which was accepted in the majority opinion in *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, 70, C.A.D. 639 (1957):
>
> > The term, "music box," as defined by leading dictionary authorities, is a case or a cabinet, housing a mechanism that plays tunes or melodies automatically. Specifically, Webster's New International Dictionary defines "music box" as "a box or case containing apparatus moved by clockwork so as to play certain tunes automatically." Funk & Wagnalls New Standard Dictionary embodies the definition of "music box" under the word "musical," wherein "m.box" is defined as "a case or cabinet containing a mechanism contrived to reproduce melodies, and frequently possessing additional musical effects. The notes are reproduced by the vibrations of steel teeth struck by minute pegs projecting from the surface of a revolving cylinder." [2]

It is patent that only the lower music box portion of the importation responds to the quoted definition and that the dancing couple is without its scope. Furthermore, the probative effect of the sample exhibit itself is such as to prove the article is more than a music box. For even a cursory observation of the exhibit compels the conclusion that the dancing figures are neither incidental nor subordinate to the music box component, but are at least of equal importance to the overall design, appearance, and operation of the imported article.

The importance of the dancing couple to the successful marketing of the item is attested to in plaintiff's affidavits accompanying its motion (portions of which have been quoted previously) as well as

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[2] The appellate court, in the cited *Cody* case, *supra*, 44 CCPA 67, also noted (p. 72):

> The intended purpose of music boxes, with which we are primarily concerned here, as is obvious from the name itself, and as shown by the definitions quoted, is to play music, and it would seem that only those elements which are essential to the production of that result can properly be considered parts of music boxes. The plastic figurines here contribute nothing whatever to the playing of the music. The music boxes play exactly the same tune in the same way whether the figurines are attached to them or not.

in an accompanying sheet from plaintiff's 1972 sales catalogue (exhibit 2B, p. 7). Significantly, the descriptive literature on that page does not refer to the model in issue, or any part thereof, as a music box or a musical article (as it does with all the other items shown on that sheet) but states only—

> THE DANCERS
> Watch our couple whirl under their protective dome. 5" high.
> No. 6145

In other words, a major selling feature of the article consists of the dancing couple and dome components, not the music box portion. Under such circumstances, the major contribution of the dancing couple to the uniqueness and distinctiveness of the entire article, as well as its marketability, is unquestioned.

Accordingly, it must be concluded that the articles in controversy are more than music boxes and are not classifiable under item 725.50. And as previously noted (Sturm, *A Manual of Customs Law* (1974), p. 298) it is well settled that if a particular import in fact constitutes more than an article provided for in the tariff classification schedules, it is not classifiable under the provision applicable to the latter article. See, e.g., *Pollard Bearings Corporation* v. *United States*, 62 CCPA 61, C.A.D. 1146, 511 F. 2d 568 (1975); *United States* v. *Acec Electric Corp.*, 60 CCPA 113, C.A.D. 1091, 474 F. 2d 1009 (1973); *United States* v. *Flex Track Equipment, Ltd., et al.*, 59 CCPA 97, C.A.D. 1046, 458 F. 2d 148 (1972); *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *United States* v. *A. W. Fenton Co., Inc.*, 49 CCPA 45, C.A.D. 794 (1962).

It is also noted that combination articles which, as imported, incorporate a music box or music box mechanism, have been held to be more than music boxes for tariff classification purposes. *Thorens, Inc.* v. *United States*, 31 CCPA 125, C.A.D. 261 (1943) (toilet paper holder equipped with a music box mechanism); *Lador, Inc.* v. *United States*, 4 Cust. Ct. 123, C.D. 304 (1940) (music box Christmas tree stands).

The cases relied upon by plaintiff have no bearing on the issues at hand as they involve merchandise consisting essentially of music boxes which possess, in some instances, other minor incidental or subordinate functions, as in *United States* v. *Borgfeldt & Co.*, 13 Ct. Cust Appls. 620, T.D. 41461 (1926) (music boxes with letters of the alphabet or pictures printed on the box); *Henry Coehler Co., Inc.* v. *United States*, 26 Cust. Ct. 406, Abs. 55455 (1951) (music box in the shape of a church); and *G. W. Sheldon & Co.* v. *United States*, 55 Treas. Dec. 1055, Abs. 8118 (1929) (miniature piano-shaped article containing a music box mechanism and also serving as

a receptacle for jewelry or other small articles). See also *New York Merchandise Co., Inc.* v. *United States*; 62 Cust. Ct. 283, 290, C.D. 3746 (1969), *aff'd*, *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

In *J.C. Robold & Co.* v. *United States*, 43 Treas. Dec. 18, T.D. 39396—G.A. 8596 (1923), merchandise consisting of a mechanical lifelike singing bird in a brass cage containing a music box which, when operated, caused the bird to open its beak, move its head and tail, and emit trilling sounds, was held to have been properly classified under the Tariff Act of 1930 as a musical instrument rather than as manufactures of metal, as claimed. However, the issue in *Robold* was entirely different than the issue in the present case. For in *Robold* the sole issue was whether the article responded to the definition of a musical instrument although it did not emit a continous melody and a chromatic scale could not be played upon it.

III

This brings us to plaintiff's alternative claim that the articles should have been severed for classification purposes and that the music box portion, with or without the plastic dome, should have been classified as music boxes under item 725.50, while the figures, with or without the plastic dome, should have been assessed as dolls under item 737.20. On this issue, both parties agree that the importations are entireties for tariff purposes. In fact, plaintiff specifically states in its brief (pp. 10–11) that the merchandise should be classified as an entirety but adds (Brief, p. 10):

> We make an alternative claim for severance only because the appellate court in the case of *United States* v. *Cody Manufacturing Co., Inc.*, 44 CCPA 67, C.A.D. 639 (1957), held that dancing dolls (designed to be assembled after importation with certain domestic articles to form an article very much like the merchandise herein), very similar to the dancing figures on the articles in litigation, should be classified as dolls, and not as "*parts*" of music boxes.
>
> That *Cody* decision *did not* involve the question of entireties, and everything said by the court in connection with the completed article (with which the dancing dolls were used) is *dicta*. The *Cody* decision was predicated only on the conclusions that said dancing dolls were not *parts* (of music boxes) because they were "not essential to the operation" of the completed mechanism, nor "contribute in any way to the production of music"; also that there was a specific provision in the Tariff Schedules for "dolls".
>
> Said *Cody* decision involved entirely different legal issues and should not control the instant litigation. However, should this court find to the contrary, we make an alternative claim for severance. [Emphasis in original.]

The court agrees with the parties that the decision in *Cody* dealt with a different issue and is not applicable here on the question of entireties. The *Cody* case involved musical movements, figurines, brass tubes, and blocking screws which, the court noted (44 CCPA at 68), did "not, as imported, constitute unitary devices but * * * [were] distinct and disconnected." After importation, the items were assembled with domestically produced music boxes to form an article somewhat similar to the instant merchandise. The question presented was whether the figurines, tubes, and screws were properly classifiable as dolls, as assessed, or as parts of music boxes, as claimed. The case turned on the application of the principle governing classification of merchandise as "parts" of an article.

In the present case, the issue presented and the applicable principle of statutory construction are materially different. The question before the court, which is whether or not the articles as imported are complete tariff entities, is governed by the doctrine of entireties.

Further, on the question of entireties, it is fundamental that an article composed of separate components imported together as a physical unit or a set is an entirety if the joined components form a new commercial article which possesses a new and distinct character of its own different from that of any of its parts. E.g., *J. C. Penney Purchasing Corporation* v. *United States*, 77 Cust. Ct. 48, C.D. 4671 (1976); *Mattel, Inc.* v. *United States*, 76 Cust. Ct. 84, C.D. 4639 (1976); *Mitsui & Co. (U.S.A.), Inc.* v. *United States*, 70 Cust. Ct. 53, C.D. 4407 (1973); *Sherriff-Guerringue, Inc.* v. *United States*, 62 Cust. Ct. 711, C.D. 3852 (1969); *V. Alexander & Company, Inc.* v. *United States*, 59 Cust. Ct. 510, C.D. 3212, 276 F. Supp. 573 (1967).

Tested by these standards, it is clear that the imported articles here involved are entireties. The music box, dancing couple, and dome components in combination form a new article possessing a distinctive character different from that of its parts.

It follows that the merchandise is not severable for tariff classification purposes and that plaintiff's reluctantly proffered alternative claim for separate classification of the components must fall.

IV

In summary, the court holds (1) that the imported articles were erroneously classified by the government as toys; (2) that the articles are not classifiable as music boxes, as claimed by plaintiff, but are "more than" music boxes; and (3) that the articles are entireties and hence not severable for classification purposes.

For the foregoing reasons, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and the action is dismissed without affirming the government's classification.

(C.D. 4724)

ATAKA AMERICA, INC. *v.* UNITED STATES

Memorandum Opinion Accompanying Order

Court No. 75–9–02377

Port of New York

[Motion to dismiss granted.]

(Dated December 9, 1977)

Serko & Simon (*Margaret H. Sachter* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Sidney H. Kuflik*, trial attorney), for the defendant.

BOE, Judge: The defendant presently moves to dismiss this action for lack of subject matter jurisdiction, arguing that the protest was not timely filed by the plaintiff and that at the time the protest herein was filed, a previous protest covering the same entry had been made.

The articles involved are gas chromatograph parts which entered this country on October 17, 1971, under entry No. K185002. The entry was liquidated on December 14, 1973. Upon this liquidation, the merchandise was appraised with an advance from the entered value, and was classified under item 712.49, TSUS, with duty at the rate of 10% ad valorem. In addition, the entry was subjected to a supplemental duty of 10% ad valorem pursuant to Presidential Proclamation 4074. On January 3, 1974, the plaintiff filed protest No. 1001–4–000122 against this liquidation, contesting solely the validity of the supplemental duty under the Presidential Proclamation. This protest was denied on August 9, 1974. On January 21, 1975, plaintiff filed a timely summons, Court No. 75–1–00203, to contest this denial.[1]

On June 24, 1974, however, the Customs Service reliquidated entry No. K185002 and reduced the appraised value of the merchandise to the entered value.[2] No change was made with respect to the classification of the merchandise or to the imposition of the supplemental 10% duty under Presidential Proclamation 4074. Nevertheless, on September 19, 1974, the plaintiff filed a second protest—No. 1001–4–011705—which again challenged only the validity of the supplemental duty under the Presidential Proclamation. This protest was denied on April 11, 1975, for the express reason that Court No. 75–1–00203,

[1] Court No. 75–1–00203 was dismissed on February 4, 1977, pursuant to rule 14.6(c), for failure of the plaintiff to prosecute.

[2] The reasons for and propriety of this reliquidation, though not apparent from the papers on file in this case, are issues with which this court need not concern itself in the determination of this motion.

dealing with the same entry, was then pending in this court. A summons commencing the instant action was thereafter filed on September 17, 1975, contesting the denial of the second protest.

The jurisdiction of this court is defined by 28 U.S.C. § 1582. With particular relevance to this case, the section provides:

> § 1582. Jurisdiction of the Customs Court.
>
> * * * * * * *
>
> (c) The Customs Court shall not have jurisdiction of an action unless (1) * * * a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended * * *.

Section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514, sets forth the requirements for a valid protest, which, under 28 U.S.C. § 1582(c), is a condition precedent to this court obtaining jurisdiction. Section 1514 provides in pertinent part:

> § 1514. Protest against decision of appropriate customs officer;
>
> * * * * * * *
>
> (b) Form, number, and amendment of protest; filing of protest.
>
> (1) A protest of a decision under subsection (a) of this section shall be filed in writing with the appropriate customs officer * * *, setting forth distinctly and specifically each decision described in subsection (a) of this section as to which protest is made; * * *. *Only one protest may be filed for each entry of merchandise*, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. * * *
>
> (2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.
>
> (c) Limitation on protest of reliquidation.
>
> *The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the customs officer upon any question not involved in such reliquidation.* [Emphasis added.]

It is acknowledged by both parties that the sole purpose of the reliquidation in the instant proceeding was to reduce the appraised value of the merchandise. The validity of Presidential Proclamation 4074, upon which plaintiff's initial protest (No. 1001–4–000122) was based, was "not involved in such reliquidation." Accordingly, the protest against this reliquidation could and did not validly challenge the legality of the supplemental duty. See 19 U.S.C. § 5114(c).

As hereinbefore noted, at the time the instant protest to the reliquidation was filed on September 19, 1974, a timely protest contesting the supplemental duty on the subject entry had previously been filed by the plaintiff and denied by the defendant. The plaintiff con-

tends, however, that it was necessary to file the instant protest because the reliquidation of the entry on June 24, 1974, rendered the entire original liquidation, and the protest therefrom, a nullity. At one time, this was a correct statement of customs law. See *United States* v. *Godchaux Sugars, Inc.*, 11 Ct. Cust. Appls. 529, T.D. 39678 (1923), and cases cited therein. However, in enacting section 514 of the Tariff Act of 1930, Congress provided that only matters which were involved in a reliquidation could be the subject of a protest therefrom. As the Committee on Ways and Means of the House of Representatives explained:

> Under the existing law, it has been held that a reliquidation opens up the whole entry to protest. It is thus possible for an importer having an entry with a large number of items to protest one item at a time and thereby keep the entire entry from final liquidation indefinitely. Your committee proposes the imposition of a limitation that reliquidation of an entry will not open the entry to protest upon any question not involved in the reliquidation. [H. Rep. No. 7, 71st Cong., 1st Sess. at p. 179 (1929).]

Thus, under the statutes presently applicable herein, the original liquidation was nullified only as to the question with which the reliquidation dealt (appraised valuation). As to all other matters, not the subject of reliquidation, the original liquidation remained in full effect.[3] The filing of the protest by the plaintiff in the instant action against the reliquidation of the regional commissioner again challenging the validity of Presidential Proclamation 4074, therefore, must be regarded as the filing of a second protest on the same entry of merchandise contrary to the provisions of 19 U.S.C. § 1514(b)(1).

The motion to dismiss by the defendant will be granted.

Let an order be entered accordingly.

(C.D. 4725)

WEBCOR ELECTRONICS *v.* UNITED STATES

Defendant's Motion to Sever and Dismiss

Court No. 73-1-00175

Port of New York

[Motion granted.]

(Dated December 9, 1977)

Serko & Simon, Esqs. (*Margaret H. Sachter, Joel K. Simon* and *Gerald B. Horn* of counsel) for the plaintiff.

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[3] Protest No. 1001-4-000122 accordingly was properly filed against the first liquidation and led to the timely filing of the summons in Court No. 75-1-00203. However, the plaintiff's failure to prosecute that action pursuant to the rules of this court resulted in its dismissal in February of 1977.

Barbara Allen Babcock, Assistant Attorney General (*William F. Atkin*, trial attorney), for the defendant.

1.

NEWMAN, Judge: Defendant has moved for an order severing entry No. K198198 covered by this civil action and dismissing the action as to this entry for lack of jurisdiction. The predicate asserted by defendant for this court's lack of jurisdiction is the alleged invalidity under 19 U.S.C. § 1514(b)(1) of the second protest filed in connection with entry No. K198198 respecting a category of merchandise that was the subject of a prior protest.

Upon careful consideration of the parties' briefs and oral argument, I have concluded that defendant's motion should be granted.

The factual basis of this controversy is simple and undisputed. The merchandise in entry No. K198198 comprises, solely, "Webcor" model WFX257 8-track stereo tape players with AM/FM/MPX receivers. On January 5, 1972 plaintiff through its then counsel, filed protest No. 1001–2–000628 contesting the assessment of a 10 percent "surcharge" under item 948.00, TSUS, pursuant to Presidential Proclamation 4074, on the merchandise covered by entry No. K198198. Plaintiff claimed that the surcharge proclamation is invalid, null and void, or alternatively that the amount of duties was excessive. The denial of protest No. 1001–2–000628 is presently the subject of a separate civil action, Court No. 72–11–02302. Subsequently, on March 8, 1972 plaintiff filed a second protest, No. 1001–2–013374, involving the identical merchandise and entry covered by the first protest, but this time contesting the classification of the merchandise under item 685.30, TSUS. Plaintiff claimed that the merchandise was properly dutiable under item 678.50, TSUS. The denial of the second protest is contested in this action.

From the foregoing facts, it is apparent that entry No. K198198, sought to be severed by defendant, is presently the subject of *two protests*, which are in turn the subject of separate civil actions; and that it is the *second protest* covered by the instant action which defendant contends was improperly filed.

In support of its motion for severance and dismissal respecting entry No. K198198, defendant asserts that the court lacks jurisdiction of the second protest (No. 1001–2–013374) inasmuch as it contravenes the one protest per entry rule in 19 U.S.C. § 1514(b)(1).[1]

In opposition to defendant's motion, plaintiff seeks to fit the

[1] Section 1514(b)(1), so far as pertinent, reads:

"* * * *Only one protest may be filed for each entry of merchandise*, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest. * * *" (Emphasis added.)

second protest within the exception to the one protest rule in section 1514(b)(1) for an entry covering "merchandise of different categories". Alternatively, plaintiff argues that the second protest should be deemed as "amendment"of the first protest.

Initially, I shall address plaintiff's contention that the first and second protests filed in connection with entry No. K198198 cover "merchandise of different categories" within the purview of section 1514(b)(1).

There is no dispute that, pursuant to 19 U.S.C. § 1514(b)(1) where an entry covers merchandise of different categories, a separate protest may be filed for each category of merchandise. However, an examination of entry No. K198198 and the two protests covering that entry substantiates defendant's position that there is only one category of merchandise involved: "Webcor" model WFX257 8-track stereo tape players with AM/FM/MPX receivers.

Nevertheless, plaintiff insists that the two protests covered "merchandise of different categories" on the theory that the protests contested different "classifications". Plaintiff's rationale is: (1) identical merchandise in an entry may be in two different "categories" for purposes of section 1514(b)(1) if it was "classified" by the customs officials under two different item numbers in the Tariff Schedules; (2) all assessments of duty based upon an item number in the Tariff Schedules involve "classification"; (3) therefore, the assessment of the surcharge pursuant to item 948.00, TSUS, was a "classification" (categorization) of the merchandise, and similarly the assessment of duties pursuant to item 685.30, TSUS, was a second classification (categorization) of the merchandise; and (4) inasmuch as each of the protests challenged a different "classification", the two protests covered "merchandise of different categories".

Such construction of section 1514(b)(1) is plainly untenable, since plaintiff reads "merchandise of different categories" as though it read "merchandise of different classifications".

In *Minox Corporation d/o Berkey Photo, Inc.* v. *United States*, 77 Cust. Ct. 110, C.D. 4680 (1976), this court observed with reference to the one protest per entry rule (77 Cust. Ct. at pages 110–11):

> Plainly, the intent of section 1514(b)(1) is to require an importer to present all claims arising out of the liquidation of an entry in a single protest, unless there are different categories of merchandise in the entry, in which event a separate protest may be filed for each category. Consequently, the issue raised by defendant's motion is whether the three protests identified above cover a category of merchandise which is the subject of other protests in contravention of section 1514(b)(1).
>
> Protest No. 1001–4–000354 (covered by Court No. 74–8–02136) relating to entry No. 185251 covers *film*, while protest

> No. 1001–4–000355 relating to the same entry, covers *clamps* and *tripods. Thus, the two protests were properly filed for different categories of merchandise.* * * * [Emphasis added.]
>
> * * * * * * *
>
> In sum, it is clear that section 1514(b)(1) permits importers to file separate protests where the entry covers merchandise of different categories, as contended by plaintiff. * * * Nevertheless, it should be emphasized that where, as here, separate protests are filed involving the same entry, the plaintiff must comply with the statutory prerequisite that *separate categories* of merchandise be covered by *each* protest. [Emphasis in original.]

It may be noted that in determining whether or not there was merchandise of different categories involved in *Minox*, this court focused upon the *nature of the merchandise*, viz., film, clamps, and tripods. Here, however, plaintiff erroneously asks the court not to focus upon whether the first and second protests in fact covered different merchandise, but rather upon whether the protests contested different "classifications".

Again, in the recent decision in *Russ Togs, Inc.* v. *United States*, 79 Cust. Ct. 119, C.D. 4722 (1977), this court severed and dismissed second protests challenging the appraisements where the second protests covered merchandise identical to that involved in the first protests, which contested the classifications. With reference to the one protest per entry rule in section 1514(b)(1), this court commented (79 Cust. Ct. at page 123):

> The other exception to the one protest per entry rule in section 1514(b)(1), permitting the filing of separate protests *where an entry covers merchandise of different categories*, has no applicability in this case, *since the dual protests covering each of the entries sought to be severed concern merchandise of the same category, viz., jackets.* The fact that the first and second protests challenge different administrative decisions (e.g., classification and appraisement) does not bring the dual protests within the exception in section 1514(b)(1) for separate protests covering different categories of merchandise. * * * [Emphasis added in part.]

Respecting the Congressional intent and objective of the one protest per entry rule in section 1514(b)(1), this court further observed in *Russ Togs, Inc.*:

> Central to the resolution of the jurisdictional issue presented here is the Congressional intent manifested in the one protest per entry rule in section 1514(b)(1).
>
> Prior to the modernization of procedures in 1970 relating to judicial actions and administrative proceedings in customs matters by P.L. 91–271 (84 Stat. 274), there was no statutory bar to the filing of multiple protests respecting the same entry of merchandise. * * *
>
> * * * * * * *

> In view of the legislative background cited *supra*, it is apparent that *one of the principal concerns of Congress in enacting P.L. 91–271 was to avoid piecemeal administrative processing and subsequent litigation of different issues pertaining to the same entry of merchandise;* and it is beyond peradventure that Congress did not desire the filing of separate protests contesting classification and appraisement for the same category of merchandise in a single entry.
>
> To effectuate the Congressional intent in the one protest per entry rule in section 1514(b)(1), I am clear that only the *first* protest received by customs for filing may practicably be treated as valid. *The filing of multiple protests challenging different administrative decisions in a liquidation (viz., classification, appraisement, etc.) regarding the same category of merchandise in a single entry is plainly inimical to the objective of the statute seeking to streamline the administrative and judicial review of customs decisions.* * * * [Emphasis added in part.]

As in *Russ Togs, Inc.*, plaintiff here filed dual protests challenging two separate administrative decisions (assessment of surcharge under item 948.00, and classification under item 685.30), notwithstanding such decisions pertained to the same entry, and *the identical merchandise was covered by both protests.* See also, *e.g., Ataka America. Inc.* v. *United States*, 79 Cust. Ct. 135, C.D. 4724 (slip op. Dec. 9, 1977, p. 5).

The short of the matter is that I am compelled to reject plaintiff's abstruse interpretation of the phrase "merchandise of different categories" in section 1514(b)(1) to mean "merchandise of different classifications". If separate protests cover identical merchandise in a single entry, as is the situation here, obviously the exception in the statute relied upon by plaintiff for filing multiple protests is inapplicable.

2.

We now turn to plaintiff's argument that if the court finds that the first and second protests did not involve merchandise of different categories, the second protest should be deemed an amendment of the first. Plaintiff further requests that if the second protest is deemed an amendment of the first, "the Court find that the filing of the summons in the first action, Court No. 72–11–02302, carries with it the question of classification under Item 685.30 or Item 678.50, TSUS, and that jurisdiction of the second protest would be proper in the first action". Plaintiff also asks leave to amend the pleadings in Court No. 72–11–02302 to include the classification question raised in the second protest.

The statutory provision governing amendment of protests in section 1514(b)(1) reads:

> * * * A protest may be amended, *under regulations prescribed by the Secretary*, to set forth objections as to a decision or deci-

> sions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. * * * [Emphasis added.]

Pursuant to the statutory directive respecting regulations, the Secretary of the Treasury promulgated 19 C.F.R. 174.14, which provides in pertinent part:

> (b) *Form and number of copies of amendment.* An amendment to a protest shall be filed in quadruplicate on Customs Form 19 or on a form of the same size, *clearly labeled "Amendment to Protest" at the top of the form.* * * *
>
> (c) *Contents.* An amendment to a protest shall contain the following information:
>
> * * * * * * *
>
> (2) The number and date of filing of the original protest;
>
> * * * * * * *

The second protest was neither labeled "Amendment to Protest", nor did it refer to "[t]he number and date of filing of the original protest", as specified by the above-quoted regulation. In point of fact, each protest filed in connection with entry No. K198198 is, on its face, a separate and independent document; and there is no indication whatsoever in the second protest that it was intended as an amendment of the first protest. *Cf. Russ Togs, Inc., supra.* Plaintiff blandly characterizes its noncompliance with the regulations as a "technicality".

It is true, of course, as pointed out by plaintiff, that the court has traditionally taken a liberal posture concerning the form and sufficiency of *protests* filed pursuant to section 1514. See, *e.g., Mattel, Inc.* v. *United States*, 72 Cust. Ct. 257, C.D. 4547 (1947), and cases discussed therein. However, it is emphasized that here the issue before the court does not concern the form and sufficiency of the second protest *as a protest*, but rather whether such second protest constitutes *an amendment of the first protest.* Respecting this issue of protest amendment, applying even the most liberal construction of the statutory and regulatory requirements, I see nothing in the second protest indicating that it was intended as an amendment of the first protest. Moreover, as conceded by plaintiff, even if the second protest were treated as an amendment of the first, the court would still be required to sever entry No. K198198 and dismiss this action as to the merchandise covered by that entry.

Finally, as I have concluded that the second protest was not an amendment of the first protest covered by Court No. 72–11–02302, that action presently does not include the issue of classification under item 678.50, TSUS, raised by plaintiff in the second protest. The propriety of allowing plaintiff to include a new ground in support of

its action in Court No. 72–11–02302, pursuant to 28 U.S.C. § 2632(d), is an issue not presently before this court for resolution.[2]

3.

Moreover, plaintiff argues that the first and second protests should have been consolidated by the customs officials. However, under section 1514(b)(1) separate protests may be "deemed to be part of a single protest" only where they are filed by *different authorized persons*,[3] which is not the situation here. *Cf. Russ Togs, Inc., supra.* Further, plaintiff's request that the instant action be consolidated with Court No. 72–11–02302 is denied, inasmuch as the latter action presently does not include the issue of classification under item 685.30, TSUS. Plainly, since Court No. 72–11–02302 contests the surcharge assessment, and the instant action challenges the classification of the merchandise under item 685.30, TSUS, the actions do not involve "a common question of law or fact", which is the basis for consolidation of actions pursuant to rule 10.3(a) of the court.

4.

Additionally, plaintiff infers that this court has jurisdiction of the action respecting entry No. K198198 on the basis that the second protest was administratively reviewed and denied, citing 28 U.S.C. §1582(a). That section reads:

> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, * * *.

In brief, plaintiff's effort to fit the present case within the rubric of section 1582(a) is contrived at best. That provision must be read *together* with section 1582(c), which states:

> (c) The Customs Court shall not have jurisdiction of an action unless * * * a protest has been filed, *as prescribed by section 514 of the Tariff Act of 1930, as amended*, * * *. [Emphasis added.]

As noted in *Russ Togs, Inc., supra*, filing of a protest in compliance with section 1514(b)(1) is a predicate of this court's jurisdiction. Hence administrative review and denial of a second protest filed in contravention of section 1514(b)(1) does not confer jurisdiction on the Customs Court.

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[2] An examination of the docket in Court No. 72–11–02302 discloses that no complaint has yet been filed in that action, which presently remains in a suspension disposition file.

[3] See also 19 C.F.R. § 174.15 covering: "Consolidation of protests filed by *different parties*" (emphasis added). To the extent that this regulation may be literally read to authorize a *single party* to file multiple protests relating to one category of merchandise covered by an entry, the regulation contravenes the express terms of 19 U.S.C. § 1514(b)(1). The statute is clear that separate protests relating to one category of merchandise may be deemed part of a single protest only where they are filed by *different authorized persons*. Moreover, the court cannot retroactively reconstruct the separate manner in which the protests covered by this action were administratively processed. Rather, the court must deal with the jurisdictional issue in light of the fact that two protests were filed and each protest was treated administratively as separate.

5.

Plaintiff cites *Mansubco, Inc.* v. *United States*, Court No. 74–8–02256, wherin the identical issue presented herein was before the Customs Court. There, in an unpublished order issued without opinion on March 28, 1975, the court denied defendant's motion to dismiss. However, in *A & A Trading Corp.* v. *United States*, Court No. 74–3–00615, which also involved the identical issue presented herein, an unpublished order was issued without opinion on February 28, 1975 granting defendant's motion to sever and dismiss. I have arrived at and follow the same decision in the present case as determined by the court in *A & A Trading Corp.* [4]

In summary, plaintiff has disregarded the plain meaning of section 1514(b)(1), which limits an importer to filing one protest to contest all administrative decisions arising out of an entry comprising one category of merchandise. Inasmuch as the first and second protests herein cover *identical merchandise*, plaintiff's position that they cover two "categories" of merchandise is simply sophism. To be sure, the initial protest could have contested both the assessment of surcharge under item 948.00, TSUS, and the assessment under item 685.30, TSUS; or the initial protest could have been amended in accordance with the statutory and the regulatory requirements to include the claim under item 678.50, TSUS. But for whatever reason, plaintiff utilized neither of those permissible courses of action. Rather, plaintiff filed a second protest, which is the subject of the instant action, and has thereby attempted to maintain two proceedings for the potential refund of duty on a single entry and the identical merchandise. In view of the statutory proscription of multiple protests, plaintiff's second protest was improperly filed. Accordingly, it is hereby ordered that the instant civil action be severed and dismissed as to the merchandise covered by entry No. K198198.

(C.D. 4726)

EXCELSIOR IMPORT ASSOCIATES, INC. *v.* UNITED STATES

Ornamented fabrics

Court No. 76–11–02563

Port of New York

(Decided December 13, 1977)

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[4] In another case, *Intercontinental Fibres Inc.* v. *United States*, Court No. 74–9–02535, defendant's motion to dismiss was granted in an unpublished order without opinion signed on April 24, 1975, but that order was subsequently vacated without prejudice to defendant, and the case was suspended under the instant action, by an order signed on July 8, 1975.

[Judgment for defendant.]

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section, and *Laura D. Millman*, trial attorney), for the defendant.

BOE, Judge: The merchandise in question in the above-entitled action described as women's cotton gauze shirts was imported from India and entered at the port of New York on July 16, 1975 and July 31, 1975.

Upon liquidation the merchandise was classified under item 382.00, TSUS, providing in pertinent part:

Schedule 3. – TEXTILE FIBERS AND TEXTILE PRODUCTS

Part 6. – Wearing Apparel and Accessories

Subpart F. – Other Wearing Apparel

* * * * * * *

	Women's, girls', or infants' lace or net wearing apparel, whether or not ornamented, and other women's, girls', or infants' wearing apparel, ornamented:	
382.00	Of cotton	35% ad val.

Plaintiff, however, contends that the merchandise properly should be classified under item 382.33, TSUS, providing in pertinent part:

	Other women's, girls', or infants' wearing apparel, not ornamented:	
	Of cotton:	
* * * * * * *		
	Not knit:	
* * * * * * *		
382.33	Other	16.5% ad val.

Counsel for the respective parties by way of written stipulation have agreed: (1) that the shirt appended thereto, received in evidence as Joint Exhibit 1, is a sample of the merchandise at issue; (2) the shirt has a right and left breast pocket on each of which a tuck, approximately one inch in width, has been sewn extending from the top of the pocket to the bottom thereof; (3) the tuck is created and made fast by a row of stitches sewn underneath the tuck and vertically along the center of the pockets.

The sole issue to be determined herein is whether this "tucking" causes the merchandise in question to be "ornamented" within the purview of item 382.00, TSUS.

In determining whether the merchandise in question has properly been classified as "ornamented," our consideration initially is directed to schedule 3, headnote 3 of the Tariff Schedules of the United States (TSUS), which provides:

> 3. For the purposes of the tariff schedules—
> (a) the term "ornamented", as used with reference to textile

fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—

* * * * * * *

(iii) lace, netting, braid, fringe, edging, *tucking*, or trimming, or textile fabric; [Emphasis supplied.]

At first impression this headnote might be interpreted as providing that textile materials and fabrics containing such additions as "lace," "braid," "tucking," etc. are deemed ornamented *per se* within the purview of the tariff schedules. However, in the case of *Blairmoor Knitwear Corp. et al.* v. *United States*, 60 Cust. Ct. 388, C.D. 3396, 284 F. Supp. 315 (1968), our court stated (at p. 392):

> At this juncture, it is pertinent to observe that while the Headnote to which we have herein referred purports to define the term "ornamented", it does not actually do so. Instead it sets forth the circumstances under which fabrics and articles may be considered to be ornamented, and the types of embellishments which may accomplish that effect. As is evidenced by the introductory language, the emphasis is upon the article to be adorned or embellished, not the substantive matter of what constitutes ornamentation in the first instance.
>
> * * * But it remains to be determined what constitutes ornamentation in the first instance.

See also *The Baylis Brothers, Inc.* v. *United States*, 60 Cust. Ct. 336, C.D. 3383, 282 F. Supp. 791 (1968), *aff'd*, 56 CCPA 115, C.A.D. 964, 416 F. 2d 1383 (1969); *Colonial Corp. of America* v. *United States*, 62 Cust. Ct. 502, C.D. 3815 (1969). In an attempt to erase any ambiguity which may exist in the term "ornamented fabric," our appellate court in the case of *Rifkin Textiles Corp.* v. *United States*, 54 CCPA 138, C.A.D. 925, *cert. denied*, 389 U.S. 931 (1967), deemed it proper to resort to the legislative history of the tariff schedules. Referring to the Tariff Classification Study, schedule 3, explanatory notes, page 7 (published November 15, 1960), the court quoted therefrom:

> Under the proposed definition of "ornamented," textile articles would no longer be assessed with rates of duty derived from paragraph 1529(a) on the basis of concealed, functionless pieces of braid, netting, etc. The rates derived from paragraph 1529(a) would apply only if such materials were used primarily for ornamentation. [54 CCPA at 141.]

Again, referring to the Seventh Supplemental Report of the Tariff Commission, submitted to Congress on August 14, 1963, relating to the use of the term "braid," the court quoted:

> * * * The existing requirement that the article merely be "in part of" braid is less exacting. Under the new provision, the braid must in fact ornament the fabric *in an acceptable trade sense.* * * * [*Id.* at 141. Emphasis added.]

In view of the fact that "tucking" is also enumerated as one of the several methods of ornamentation in subpart (iii) of schedule 3, headnote 3 in the same manner as "braid," a similar standard of interpretation necessarily must be applied to the term "tucking" as has been applied to the term "braid." Thus, as our appellate court has concluded, the relevant inquiry is not whether the particular addition is "ornamental," but rather, whether the addition serves "to make the merchandise an ornamented fabric." *Rifkin Textiles Corp., supra*, at 142. From the foregoing, it is clear that the effect of the "tucking" on the merchandise in question must be of such a nature and character as to render the imported shirts "ornamented textile articles" in an accepted trade sense.

It is well established that the classification of the merchandise in issue by the Customs Service bears a presumption of correctness having evidentiary weight in and of itself. Upon the plaintiff, therefore, rests the burden of establishing by a preponderance of the evidence that the merchandise in issue does not fall within such a classification. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *Novelty Import Co., Inc.* v. *United States*, 53 CCPA 28, C.A.D. 872 (1966). In its effort to overcome this presumption and the evidence in corroboration thereof subsequently introduced by the defendant at the trial of the instant action, the plaintiff offered the testimony of two witnesses to establish (1) that the tucking on the merchandise in issue was functional in purpose, and (2) that the tucking did not ornament the merchandise in an accepted trade sense.

Mr. Jules Kraft, president of the plaintiff corporation, and Mr. Mohan Shah, a representative of the Indian company manufacturing the merchandise in issue, testified without further explanation or substantiation that the tucking served to control the fullness of the shirt pockets and to give extra support to the pockets and the upper portion of the garment. In support of the contention that the merchandise in issue was not ornamented in the accepted trade sense, the witness, Kraft, offered his opinion, derived from his experience in selling comparable merchandise, that the tucking did not embellish the garment; that the merchandise in question was neither sold to him nor by him as "ornamented"; that the price he paid for the merchandise in issue possessing pockets with tucking as well as the price he subsequently charged his customers therefor was the same price he paid and, in turn, received for merchandise with plain pockets. Mr. Shah likewise testified that the merchandise in issue was sold by his firm to the plaintiff at the same price as merchandise with plain pockets; that the merchandise was not offered to plaintiff as ornamented nor was the merchandise considered ornamented by the Indian government in the course of its export procedures.

In support of the classification placed upon the merchandise in issue by the Customs Service and to negate the testimony offered by the plaintiff, the defendant offered the testimony of three witnesses. Mr. Sandor Borocz, a garment designer and production consultant, stated that the tucking on the merchandise in issue served neither to control the fullness nor to strengthen the pockets of the shirt. He further testified that only an interlining or a doubling of material would serve to give increased strength to the pockets. Mr. Michael Silverstein, a professor of management engineering at the Fashion Institute of Technology in New York, in turn, testified that stress on a woman's shirt in the breast pocket area is in a horizontal direction. He submitted that the tucking on the merchandise in issue, accordingly, would provide no extra strength with respect to horizontal stress and, in fact, would prove counterproductive in that the stitching would cause the fabric adjacent to the tucking to tear and rip apart.* Although Mr. Borocz testified that the tucking on the merchandise in issue was "poor ornamentation" and, in fact, in his opinion constituted neither a functional nor ornamental purpose, defendant's witness, Mr. Alfred Sloan, a professor of fashion marketing at the Fashion Institute, testified unequivocally that the tucking constituted an ornamentation and that a prospective purchaser would find the merchandise in issue to be enhanced by the tucking on the pockets.

A physical examination of Joint Exhibit 1 by the court, indeed, serves to corroborate the testimony of the defendant's witnesses. Such an examination fails to disclose in what manner the addition of the tuck on the pockets results in added strength to either the pocket or the shirt as a whole. Any functional purpose served by such tucking is difficult to discern. On the contrary, Joint Exhibit 1 clearly evidences that the tucking on the breast pockets produces a visual effect different from that which would be produced by plain pockets. Notwithstanding the intentions of the manufacturer asserted by plaintiff's witnesses with respect to the alleged purpose of the tucking, it is the resulting effect upon the merchandise, and not the intention of the manufacturer, which controls classification. *Colonial Corp. of America* v. *United States, supra; The Baylis Brothers, Inc.* v. *United States, supra.*

Reducing the plaintiff's evidence to its actual significance, it appears that only the individual and somewhat self-serving opinions of its two witnesses, have been offered to overcome the presumption of correctness attaching to the classification of the merchandise in issue in the within action. No testimony, other than the unsupported personal opinion of plaintiff's witnesses, has been offered to indicate that the merchandise in issue, containing the tucking, is not orna-

*Professor Silverstein explained that a cardinal rule in garment construction is never to make the stitching on a garment stronger than the fabric because stress will cause the fabric, rather than the stitching, to tear. This would be the result of the tucks on the subject shirts owing to the fragile, gauzy nature of the fabric.

mented in any accepted trade sense. The intent not to import ornamented merchandise may be considered relevant only insofar as it may demonstrate the state of mind of the plaintiff—and its officers or agents. Nor can the testimony regarding similar cost and sale prices for shirts with pockets containing tucking as contrasted with plain pockets be determinative as to the basic issue before the court. Likewise, the classification of the merchandise in question by the Indian government in its exporting procedures has no direct bearing upon the interpretation and construction of the Tariff Schedules of the United States—the issue before this court.

This court, therefore, concludes that the presumption of correctness, with respect to the classification of the merchandise in issue made by the Customs Service and supported by the evidence adduced by the defendant at the trial of the instant action has not been overcome by the plaintiff and that said merchandise was properly classified as liquidated under item 382.00, TSUS.

Let judgment be entered accordingly.

(C.D. 4727)

JAMES LOUDON & CO., INC. *v.* UNITED STATES

American goods returned—Marine cleanser

Court No. 73-7-01978

Port of San Francisco

(Decided December 20, 1977)

[Judgment for defendant.]

Glad, Tuttle & White (*Robert Glenn White* and *T. Randolph Ferguson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

MALETZ, Judge: This action involves a shipment of 21 drums of marine cleanser or degreaser invoiced as "Petrocon" and known as "Dunall Dunrinse," which is used for cleaning the holds or bottoms of ships. The official entry papers and accompanying documents were lost by the Bureau of Customs. However, documents presented to the court by the parties reveal that the merchandise was entered at the port of San Francisco, California on or about August 12, 1966 by plaintiff James Loudon & Co., Inc., a customhouse broker, for the account of Dunn Chemical Co. under entry number 00751. The plaintiff's copy of the consumption entry lists the value of the merchandise at $3,696.00 and claims classification as American goods returned

under item 800.00 of the Tariff Schedules of the United States (TSUS) which carries a duty-free rate.

The entry was liquidated by Customs on December 12, 1967 and assessed duty of 3.5 cents per pound plus 25% ad valorem under item 405.35, TSUS, which covers—

> [p]roducts * * * chiefly used for any one or combination of the following purposes: as detergents, wetting agents, emulsifiers, dispersents, or foaming agents.

The increased duty of $1,313.55 was paid in or about April 1971.

The protest in this action was filed on February 21, 1973 against the assessment of duties under item 405.35. However, *this* protest does *not* challenge the liquidation of December 12, 1967; rather, it challenges Customs' refusal of plaintiff's request for reliquidation, which request plaintiff claims was filed on February 6, 1968 under section 520(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1520(c)).[1] According to plaintiff, this request for reliquidation was not acted upon by Customs until January 12, 1973 when it was denied, thus making plaintiff's protest of February 21, 1973 timely under section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514 (1970 ed.)).[2]

Plaintiff's claim in essence is that the imported merchandise was exported aboard the S.S. NILOS from Portland, Oregon as ships stores, which are materials used and consumed in the normal operation of a vessel. Plaintiff claims that the merchandise was later returned to the United States from Vancouver, British Columbia without having been advanced in value or improved in condition while abroad and was therefore entitled to duty-free entry as American goods returned under item 800.00, TSUS. It asserts that it filed a timely protest under section 514 of the Tariff Act of 1930, as amended, against classification by the Bureau of Customs under item 405.35 within 60 days after liquidation on December 12, 1967, which protest it alleges was lost by Customs. Also, as already noted, plaintiff contends that on February 6, 1968 it filed a request for reliquidation under section 520(c) of the Tariff Act of 1930, within 60 days of the liquidation (December 12, 1967) which request was allegedly not acted upon by Customs until January 12, 1973, following which it filed a protest on February 21, 1973.

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[1] Section 520(c) of the Tariff Act of 1930, as amended (in effect prior to October 1, 1970), provided:

> (c) Notwithstanding a valid protest was not filed, the Secretary of the Treasury may authorize a collector to reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, appraisement, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the customs service within one year after the date of entry, appraisement, or transaction, or within sixty days after liquidation or exaction when the liquidation or exaction is made more than ten months after the date of the entry, appraisement, or transaction; * * *

[2] Section 514, as amended effective October 1, 1970, requires a protest to be filed within *90 days* after liquidation or reliquidation or refusal to reliquidate under section 520(c). Prior to October 1, 1970, section 514 required the protest to be filed within *60 days*.

Defendant presents several arguments as to why plaintiff's claim should be dismissed. First, as to the claimed lost protest, defendant argues that plaintiff did not in fact file a section 514 protest challenging the Customs' classification of the merchandise under item 405.35. Second, it argues that in any event the issue of proper classification and assessment of duties based upon the allegedly lost protest under section 514 is not before the court since the present action is based on a protest which merely challenges a refusal to reliquidate under section 520(c).

Further, with regard to plaintiff's protest filed on February 21, 1973, challenging Customs' refusal to reliquidate under section 520(c), defendant contends that plaintiff failed to comply with the statutory requirements of Section 520(c) in that it did not bring any clerical error, mistake of fact or other inadvertence not amounting to an error in the construction of a law to the attention of Customs within the statutory period of 60 days after the liquidation of December 12, 1967.[3] More particularly, defendant argues that the record shows that request for reliquidation under section 520(c) was not filed on February 6, 1968, as claimed by plaintiff, but rather was filed on August 26, 1968 and was thus untimely. Defendant further argues that the record shows that plaintiff's request for reliquidation was denied by Customs on October 24, 1968 and not January 12, 1973, as claimed by plaintiff, and that the protest of February 21, 1973 was therefore untimely. Finally, defendant insists that plaintiff failed to submit sufficient proof to substantiate its claim that the merchandise was entitled to duty-free entry under item 800.00. Hence, defendant's position with regard to the protest filed on February 21, 1973 is that Customs properly refused to reliquidate the entry under section 520(c).

The Issues

Against this background, the following issues are presented:

1. Whether plaintiff filed a protest under section 514, contesting the liquidation of the merchandise under item 405.35, TSUS, and assessment of duty at the rate of 3.5¢ per lb. plus 25% ad valorem.

2. Whether plaintiff timely brought any clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, to Customs' attention as provided in section 520(c).

3. Whether plaintiff filed a timely protest under section 514 against the refusal to reliquidate under section 520(c).

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[3] It will be recalled that the liquidation of December 12, 1967 took place 16 months after the entry of the merchandise on August 12, 1966. Under section 520(c), as previously noted, when a liquidation is made more than ten months after the date of entry—as it was here—a request for reliquidation based upon a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law must be made within *60 days* after liquidation.

4. Whether any clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law occurred in the liquidation.

5. Whether plaintiff timely complied with all applicable Customs regulations for duty-free entry under TSUS item 800.00.

6. Whether Customs improperly denied plaintiff's request for reliquidation under section 520(c).

The Record

The record consists of the testimony of two witnesses [4] and nine exhibits for the plaintiff and four witnesses [5] and seven exhibits for the defendant. From this record the following appears:

The Dunn Chemical Co. of San Francisco, California (Dunn) manufactures and distributes marine chemicals and the majority of its business is selling ships stores. It is a small operation with only three or four employees, and Mr. John W. Schrick, its president, does everything from making company decisions to making deliveries himself on occasion.

Mr. Schrick testified that the merchandise covered by the entry in question—entry number 00751—is a chemical product manufactured in San Francisco, California to the specifications of Dunn. The product—which is known as "Dunall Dunrinse"—is a degreasing material that is used for cleaning and "upgrading" the double bottoms of ships or tankers. The name "Dunall" is a trademarked one.

The events giving rise to the present controversy were recounted by Mr. Schrick as follows: In 1966, Dunn sold 35 drums of Dunall Dunrinse to the Petrocon Marine Chemical Company (Petrocon).[6] Mr. Schrick was personally involved in this sale. Mr. Peter Constantine, an agent for Petrocon,[7] was responsible for the delivery instructions on the waybill which called for a split delivery of the 35 drum shipment of Dunall Dunrinse—26 drums were ordered to be delivered to the vessel, S.S. NILOS, and 9 drums were to be delivered to the American Pacific Corp.

According to Mr. Schrick, each of the 35 drums consisted of a 55 gallon metal "one-way" drum, marked by three Dunall Dunrinse

[4] The two witnesses for plaintiff were John W. Schrick, president of the Dunn Chemical Co., the manufacturer and ultimate consignee of the marine cleanser, and James V. Loudon, a customhouse broker and president of the plaintiff company.

[5] The four witnesses for defendant were: Mrs. Mary Jones, who from 1966 to 1970 was a clerk-stenographer in the entry and cashier section of Customs at San Francisco; Mrs. Delores Mann, who served as cashier clerk of Customs at San Francisco at the time the importation was entered; James J. Scott, who as supervisory import specialist for Customs at San Francisco, was the supervisor of the commodity team which handled the entry here in question; and John Thompson, import control officer for Customs at San Francisco since 1975.

[6] As evidence of this sale, plaintiff introduced a waybill from Ringsby Pacific, Ltd. (plaintiff's exhibit 5), which listed the consignee as American Pacific Corp. and which indicated that all of the drums were marked American Pacific Corp.

[7] The name "Petrocon" is a term which stands for the name Peter Constantine.

labels, two attached at points directly below the top circumference of the drums and the third pasted on top.

Mr. Schrick testified that Petrocon could not divert the delivery of the 26 drums which were ordered on the waybill to be delivered to the S.S. NILOS because it would have no control over a waybill which showed Dunn as shipper and the cargo as being "prepaid." Likewise, if the ship had sailed prior to delivery, and for that reason the delivery could not have been made, the shipping company would have contacted Dunn for notification and for further instructions. Such notification was never made.

Mr. Schrick testified that he knew that the order was placed on board the S.S. NILOS because he never received a complaint from either Petrocon or the owners of the vessel, who paid for the material and who would have complained if a full order for which they had paid had not been delivered.

Mr. Schrick further testified that he was later advised by Mr. Constantine that 21 drums of the 26 drums had been off-loaded in Vancouver, B.C., turned over to W. Greer Tidewater Shipping,[8] and that the 21 drums would be returned to Dunn.

Mr. Schrick stated that on or about August 5, 1966, he inspected the 21 drums at the LASME warehouse in Oakland, California while the merchandise was under Customs bond control and found them to contain Dunall Dunrinse. Each of the 21 drums bore the Dunall Dunrinse label or the remnants of the said label. The labels evidenced wear and tear from exposure, but were complete enough so that Mr. Schrick was satisfied and accepted them as Dunall Dunrinse. Each of the drums, Mr. Schrick stated, was a one-way drum which didn't weather well, and was in such a condition that the merchandise was repacked in new drums, put back into stock and later sold as Dunall Dunrinse, while the used 21 drums went to the dump. Mr. Schrick said that he personally picked up and loaded the drums aboard the truck at the LASME terminal.

To prove that at the relevant time Customs had all the documents necessary to determine whether the claim for classification under item 800.00 should be allowed and that there were then no missing documents, plaintiff called as a witness Mr. James V. Loudon, the president of plaintiff James Loudon & Co., Inc. Mr. Loudon testified that Dunn retained his company, a customhouse broker, to enter the merchandise as American goods returned. Mr. Loudon emphasized that he was familiar with the entry procedures for articles entered under item 800.00, having had 25 years of experience in customs work. He stated that when there were missing documents at the time

[8] W. Greer Tidewater Shipping, U.G.G., Vancouver, B.C., referred to in the Los Angles-Seattle Motor Express, Inc. (hereinafter LASME) freight bill (plaintiff's exhibit 7) is either a husbanding agent with a warehouse or a ship's chandler.

of entry, a card-like form and a bond were given for the missing documents.

According to Mr. Loudon, if the customhouse broker did not supply the card form and bond, he was informed by Customs of the necessity for such a bond either after entry or after documents had been presented for entry. He added that the Bureau normally indicated in the square entitled "Missing Documents," on the consumption entry (Customs Form 7501) whether or not any documents were missing. However, he stated that there was no indication of any missing documents pertaining to the importation in question in the space provided therefor on the consumption entry (plaintiff's exhibit 2). Thus, Mr. Loudon concluded that no bond was ever given for missing documents on the entry in question, i.e., entry number 00751.

Mr. Loudon further testified that whenever there are missing documents the customhouse broker is required to submit a bond as guarantee that those documents will be submitted at a later date. The customhouse broker, in turn, charges its client, the ultimate consignee, for both the deposit and the fee for its services in executing the bond. Continuing, Mr. Loudon testified that the Loudon invoice to Dunn for services relating to entry 00751 (plaintiff's exhibit 2) contained no charge for services in executing a bond. Mr. Schrick confirmed that, insofar as this entry is concerned, Dunn was never billed, nor did it ever pay any fees relative to a bond to cover missing documents. It is to be added that the consumption entry forms do not show what documents accompanied the entry papers.

On the question of whether or not a section 514 protest was filed against the liquidation of December 12, 1967, Mr. Loudon testified that although he did not personally file a protest concerning the failure to liquidate the subject entry under item 800.00, he was advised either by the manager of plaintiff Loudon's San Francisco branch office or by the manager of the import department in that office that a protest had been filed. He stated that it was a practice of his company to prepare five copies of a protest which was to be filed and when a protest was filed with the San Francisco office of Customs in 1967 and 1968, a date-stamped and numbered copy of the protest was returned to his company by Customs. He further stated that licensing regulations required the customhouse broker to maintain a copy of a protest filed with Customs as a part of its records. However, he admitted that the Loudon company files do not contain a stamped and numbered copy of any section 514 protest against the liquidation covering the entry in question, despite the fact that it was the practice of Loudon's San Francisco office to retain copies of protests filed with Customs.

With respect to whether a request for reliquidation under section 520(c) was timely filed, Mr. Loudon referred to a letter from his

company to Customs, dated *February 6, 1968*, requesting a section 520(c) review of the liquidation (plaintiff's exhibit 4). He said that he normally would have approved it since it is a form of protest, but he could not say with certainty that he had personal knowledge of either having seen this letter prior to its submission to Customs, nor could he testify as to the exact date of its submission to Customs.

It is to be noted that this letter, dated February 6, 1968, states:

> Reference is made to Consumption Entry number 00751 of August 12, 1966, which was liquidated on December 12, 1967, with increased duties due in the amount of $1313.55. Subject entry was entered in the name of James Loudon & Co., Inc., for the account of Dunn Chemical Co., and covered 21 Drums of Petrocon.
>
> We hereby request review of subject entry under Section 520(c)(1) of the regulations for the followir.; reasons:
>
> 1) Subject entry covered merchandise which was delivered to a vessel as Ship Stores, in Portland.
>
> 2) Subject merchandise under the trade name of Petrocon is manufactured only in the United States under subject Trade Name.
>
> 3) As per Signed Copy of Customs Form 3311, signed by an Officer of Dunn Chemical Corp., they advise that this shipment was in fact delivered as ships stores to the SS NILOS at Portland, however, it was discovered that shipment was not needed by the vessel and was offloaded at the nearest North Pacific Coast Port, Vancouver, B.C. and returned to the shipper, Dunn Chemical Co.
>
> In view of the above and the attached, Customs Form 3311 and copy of Truck Blading [sic] showing delivery to Portland for SS NILOS, we respectfully request that the subject entry be reviewed and reliquidated "As Entered" as U.S. Goods returned and subject demand for increased duties, cancelled.

With respect to this letter, it is not without significance that a Customs Form 3311 in the record is dated *August 23, 1968* and not February 6, 1968, and that although the letter states that Customs Form 3311 was attached thereto, no such attachment was appended to the letter as received in evidence as plaintiff's exhibit 4. In this circumstance, the letter requesting section 520(c) relief could scarcely have been filed on a date when the attachment had not yet been prepared and signed. Further, plaintiff presented no testimony whatsoever to show that Customs Form 3311 was incorrectly dated.

It is also to be noted that an interoffice memorandum of May 4, 1972 from the acting regional commissioner of Customs to the district director, San Francisco, states that correspondence in his office indicated that the receipt date of this February 6 letter was in fact August 26, 1968 "which would make the filing of the CF 3311 * * *

eight months after the date of the liquidation of the entry." (Defendant's exhibit C).

On another aspect, in order to show that a protest had been filed against the liquidation, Mr. Loudon referred to an interoffice memorandum from the Loudon company's San Francisco office to its Los Angeles office, dated September 3, 1970 (plaintiff's exhibit 3), which stated that an employee of Loudon had checked with "Delores Mann (head cashier)" of Customs at San Francisco and also stated that she had found a "skeleton file" which showed that entry 00751 had been protested but that her file did not have the protest number or date.

Defendant, in turn, called four witnesses to establish (1) that a section 514 protest against the liquidation had not been filed; (2) that the request for reliquidation under section 520(c) was untimely; and (3) that the protest under section 514 against the refusal to reliquidate under section 520(c) was untimely.

On the question of whether or not a section 514 protest had been filed challenging the liquidation, the defendant called Mrs. Mary Jones, who from 1966 to 1970 was a clerk-stenographer in the entry and cashier section of Customs at San Francisco. Mrs. Jones testified that she did not work in the protest section during the relevant period, but did examine the protest log for 1967 [9] and all the protest copies from January 1968 through December 1969 but did not find a protest for entry 00751.

As previously noted, Mr. Loudon made reference to an interoffice memorandum of his company, dated September 3, 1970 (plaintiff's exhibit 3), which stated that an employee of Loudon had checked with "Delores Mann (head cashier)" of Customs and also stated that she had found a "skeleton file" which showed that entry 00751 had been protested but that her file did not have the protest number or date. To counter this evidence, defendant called Mrs. Delores Mann, who served as cashier clerk in the San Francisco office of Customs at the time the importation was entered in 1967. Mrs. Mann testified that a "skeleton file" is a numbered folder containing documents left in the file after a case was sent to the United States Attorney's office for collection. She said that the skeleton file might contain a copy of the letter to the United States Attorney; a copy of the letter to the surety company; and a final notice to the importer or his representative. With regard to increased duties, she testified that the cashier of Customs would, upon liquidation, make out a bill for the amount of the increased duty and notify the importer or his representative that the increase was due. If the increase was not paid within 30 days after

[9] In 1967 the protest log was a ledger listing protest numbers, entry numbers, dates of entry, the importer of record and, where applicable, the date an entry was forwarded to the Customs Court and/or any other action taken. In early 1968, the local procedure changed and an actual copy of the protest with all notations as to disposition was kept in a consecutively numbered series.

liquidation, a notice was sent to the surety company and thereafter the matter was sent to the United States Attorney for collection—as was done in the present case.

Mrs. Mann further testified that in the event a protest had been filed, the entry papers—including the protest—would be in the import specialist's files and not in the cashier's files since protested cases are not sent out for collection to the United States Attorney's office.

With respect to defendant's second argument that the request for reliquidation was untimely, defendant introduced an interoffice memorandum from the acting regional commissioner of Customs to the district director, San Francisco, stating that the correspondence in his office indicated that the receipt date of plaintiff's February 6, 1968 letter requesting reliquidation under section 520(c) was in fact August 26, 1968. See defendant's exhibit C.

Defendant's third argument, it will be recalled, is that plaintiff's request for reliquidation was denied by Customs on October 24, 1968 and not January 12, 1973, as claimed by plaintiff. To support this argument, defendant called Mr. James Scott who was the supervisor of the commodity team of Customs which handled the importation here in question. He testified that he had been directed by the regional commissioner of Customs to notify the importer in writing of the district director's denial of the importer's request for reliquidation under section 520(c) and that the Loudon company had been notified by letter, dated October 24, 1968, that its request had been denied. See defendant's exhibit B–4. In addition, by letter dated March 13, 1972, Raymond B. Turner, the director, division of entry procedures and penalties, Bureau of Customs, Washington. D.C., wrote Mr. Loudon as follows (plaintiff's exhibit 1):

> This is in response to your letter of December 27, 1971, and February 1, 1972, concerning entry 00751 of August 12, 1966, filed for the account of the Dunn Chemical Company.
>
> Based on our review of the documentary evidence presented, we have concluded that the record does not confirm your claim that the merchandise was entitled to be admitted duty free.
>
> The evidence does not confirm that the 21 drums of cleaning compound for which duty free entry is being sought as American goods returned are part of the 26 drum split shipment covered by Freight Bill No. 7226661 of Ringsby-Pacific Ltd. exported on October 14, 1965. Shipping documents which might confirm the stated lading in Portland and unlading in Vancouver have not been submitted. The record, furthermore, contains conflicting evidence as to where, by what method the exportation took place, and whether the compound was ever laden aboard a vessel.
>
> In view of the above, we do not find any basis for concluding that the district director's decision was incorrect.

Also, as pertinent to this question, defendant introduced a letter, dated January 12, 1973, from William B. Lim, director, classification

and value division of the San Francisco office of Customs, to the attorneys for plaintiff, which reads as follows (defendant's exhibit B–3):

> This is in reply to your letter of December 18, 1972, regarding San Francisco Free Entry 00751, entered August 12, 1966, in the name of James Loudon Co., Inc. a/c Dunn's Chemical Company. The entry was liquidated on December 12, 1967.
>
> The entry in question has been the subject of much correspondence between this office and Mr. James V. Loudon, president of James Loudon Co., Inc.
>
> At the request of the Bureau of Customs a narrative report and supporting documents were forwarded to the Bureau on February 16, 1972, in order that they might decide whether a refund was in order.
>
> We are enclosing a copy of the Bureau's letter of March 13, 1972, to Mr. James V. Loudon and this office now considers the matter closed.[10]

Whether Plaintiff Filed a Protest Contesting the Liquidation

We consider first against the foregoing background whether plaintiff filed a protest under section 514 contesting the liquidation of the merchandise under item 405.35. As to this, the evidence is overwhelming that such a protest was *not* filed. Thus, Mrs. Jones of Customs testified without contradiction that the 1967 protest log of Customs and its protest copies from January 1968 through December 1968—which documents were examined by counsel for plaintiff at trial—neither referred to such a protest nor contained a copy thereof. Beyond that, Mr. Loudon testified that it was the practice of his company to prepare five copies of a protest which was to be filed and when a protest was filed with the San Francisco office of Customs in 1967 and 1968, a date-stamped and numbered copy of the protest was returned to his company by Customs. He further testified that licensing regulations required the customhouse broker to maintain a copy of a protest filed with Customs as a part of its records. However, he admitted that the Loudon company files do not contain a stamped and numbered copy of *any* section 514 protest covering the entry in question—this despite the fact that it was the practice of Loudon's San Francisco office to retain copies of protests filed with Customs and despite the fact that licensing regulations required the customhouse broker to maintain in its records a copy of any protest filed with Customs.

Whether Plaintiff Filed a Timely Request for Reliquidation Under Section 520(c)

Previously it has been observed that prior to October 1, 1970 a request for reliquidation under section 520(c) had to be made within

[10] As a further witness, defendant called Mr. John Thompson, import control officer for Customs at San Francisco since 1975, who testified to the effect that various documents—which were received in evidence—were kept in the regular course of business.

60 days after liquidation when the liquidation was made more than ten months after the date of the entry. Since the entry in issue was entered on August 12, 1966 and liquidation was made on December 12, 1967, plaintiff had 60 days after December 12, 1967 to file a request for reliquidation under section 520(c). On this aspect, plaintiff emphasizes that a letter, dated *February 6, 1968*, from Loudon to Customs requesting reliquidation under section 520(c)—which letter is quoted, *supra* (plaintiff's exhibit 4)—was filed with the San Francisco office of Customs and that the request was therefore timely. Defendant, on the other hand, maintains that the request for liquidation was not filed on February 6, 1968, but rather was filed on August 26, 1968 and, hence, was untimely.

Again, the evidence is overwhelming that the request for reliquidation was not filed until the latter part of August 1968—some eight months after the liquidation—and therefore was untimely. For one thing, the Loudon company letter dated February 6, 1968, requesting reliquidation under section 520(c), makes reference to a signed copy of Customs Form 3311. However, the Customs Form 3311 in the record is dated *August 23, 1968* and not February 6, 1968. It is also to be noted that although the letter states that Customs Form 3311 was attached thereto, no such attachment was appended to the letter as received in evidence. The short of the matter is that the letter requesting section 520(c) relief could not have been filed on a date when the attached Customs Form 3311 had not yet been prepared and signed. Further, it is not without significance that plaintiff presented no testimony whatsoever to show that Customs Form 3311 was incorrectly dated.

Also bearing on this matter is an interoffice memorandum of May 4, 1972 (which also has been referred to previously) from the acting regional commissioner of Customs to the district director, San Francisco, stating that correspondence in his office indicated that the receipt date of this February 6 letter was in fact August 26, 1968.

Whether Plaintiff Filed a Timely Protest Under Section 514 Against Customs' Refusal to Reliquidate Under Section 520(c)

Even assuming *arguendo* that plaintiff filed a timely request for reliquidation under section 520(c), the record is crystal clear that it did not file a timely protest under section 514 against Customs' refusal to reliquidate under section 520(c). As has been discussed previously, section 514, as amended effective October 1, 1970, requires a protest to be filed within 90 days after refusal by Customs to reliquidate under section 520(c). Pertinent then is *when* Customs refused to reliquidate the entry under the latter section. Highly relevant on this score is a letter, dated March 13, 1972 (and quoted previously), which

Mr. Raymond E. Turner, director, division of entry procedures, Bureau of Customs, wrote to Mr. Loudon. This letter, to repeat, reads as follows (plaintiff's exhibit 1):

> This is in response to your letter of December 27, 1971, and February 1, 1972, concerning entry 00751 of August 12, 1966, filed for the account of the Dunn Chemical Company.
>
> Based on our review of the documentary evidence presented, we have concluded that the record does not confirm your claim that the merchandise was entitled to be admitted duty free.
>
> The evidence does not confirm that the 21 drums of cleaning compound for which duty free entry is being sought as American goods returned are part of the 26 drum split shipment covered by Freight Bill No. 7226661 of Ringsby-Pacific Ltd. exported on October 14, 1965. Shipping documents which might confirm the stated lading in Portland and unlading in Vancouver have not been submitted. The record, furthermore, contains conflicting evidence as to where, by what method the exportation took place, and whether the compound was ever laden aboard a vessel.
>
> In view of the above, we do not find any basis for concluding that the district director's decision was incorrect.

Thus, at the very latest, on March 13, 1972—if not sooner—there was a final refusal by Customs to reliquidate the entry under section 520(c)—as is made plain by Mr. Turner's letter to Mr. Loudon. And since the protest against this refusal was not filed until February 21, 1973—almost 11 months after such refusal—it is apparent that plaintiff's protest against the refusal by Customs to reliquidate the entry under section 520(c) is time-barred.

It is quite true that on January 12, 1973, Mr. William B. Lim, director, classification and valuation division of the San Francisco office of Customs, wrote the attorneys for plaintiff the following letter (which also has been quoted previously):

> This is in reply to your letter of December 18, 1972, regarding San Francisco Free Entry 00751, entered August 12, 1966, in the name of James Loudon Co., Inc. a/c Dunn's Chemical Company. The entry was liqudiated on December 12, 1967.
>
> The entry in question has been the subject of much correspondence between this office and Mr. James V. Loudon, president of James Loudon Co., Inc.
>
> At the request of the Bureau of Customs a narrative report and supporting documents were forwarded to the Bureau on February 16, 1972, in order that they might decide whether a refund was in order.
>
> We are enclosing a copy of the Bureau's letter of March 13, 1972, to Mr. James V. Loudon and this office now considers the matter closed.

In this setting, plaintiff insists that it was not until January 12, 1973—the date of Mr. Lim's letter—that its request for reliquidation

was denied by Customs, thus making its protest of February 21, 1973 timely under section 514. However, Mr. Lim's letter cannot be considered in any respect as a refusal by Customs to reliquidate. Rather, it is simply a summary of actions that had been taken by Customs in the past concerning the entry in question. Particularly significant is the last sentence in Mr. Lim's letter, stating: "We are enclosing a copy of the *Bureau's letter of March 13, 1972* to Mr. James V. Loudon [which letter has been quoted above] and this office now considers the matter closed." [Emphasis added.]

In summary, plaintiff's claim is time-barred, thus making it unnessary to reach the merits of the case, i.e., whether or not plaintiff is entitled to relief under section 520(c). Plaintiff's claim is therefore overruled and judgment will be entered accordingly.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 77-6)

SCM CORPORATION *v.* UNITED STATES (BROTHER INTERNATIONAL CORPORATION, PARTY-IN-INTEREST)

On Plaintiff's Motion for Three-Judge Panel

Court No. 77-4-00553

[Motion denied.]

(Dated August 15, 1977)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Glenn E. Harris*, trial attorney), for the defendant.

Tanaka, Walders & Ritger (*H. William Tanaka* of counsel) for party-in-interest.

RE, Chief Judge: Pursuant to the provisions of 28 U.S.C. § 255 (1970), plaintiff moves for the assignment of this action to a three-judge panel.

Section 255, which provides for "Three-judge trials" in the United States Customs Court, states:

> "(a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Customs Court shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.
>
> (b) A majority of the three judges designated may hear and determine the civil action and all questions pending therein."

Since no issue of a constitutional dimension is presented, plaintiff's motion is based upon the contention that this action involves "broad or significant implications in the administration or interpretation of the customs laws."

Pursuant to 19 U.S.C. §1516(a) (1970), plaintiff, an American manufacturer of portable electric and portable manual typewriters, filed a complaint charging that portable electric typewriters from Japan were being sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended, 19 U.S.C. §160 *et seq.* (1970). A broad sketch of the key provisions of this act may be helpful. See e.g., *F. W. Myers & Co., Inc.* v. *United States*, 72 Cust. Ct. 219, 220–21, C.D. 4544, 376 F. Supp. 860, 862–63 (1974).

Under the Antidumping Act of 1921 an American manufacturer may file a complaint with the Secretary of the Treasury to protest actual or threatened injury to an industry or the establishment of an industry. The Secretary has the duty to determine whether that class or kind of imported merchandise is being sold, or is likely to be sold in the United States or elsewhere, at less than fair value. The act also provides for the issuance of a notice withholding appraisement in advance of a finding of sales at less than fair value, or as soon as the Secretary has reason to believe or suspect the existence of such sales. This provisional remedy precludes importers, during the pendency of an investigation, from escaping a subsequent dumping duty assessment on the imported merchandise.

If the Secretary issues an affirmative finding of sales at less than fair value, the matter is referred to the International Trade Commission. The Commission must then determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the less than fair value sales. If the Commission makes an affirmative finding of injury or likelihood of an injury, the Secretary of the Treasury must publish in the Federal Register notice of his determination as well as the findings of the Commission. Under the Antidumping Act these administrative decisions comprise the "dumping findings." As a consequence of the finding of "dumping," the imported merchandise is assessed with additional duties.

Specifically, when a dumping finding has been published, all imported unappraised merchandise described in the finding, and entered or withdrawn from the warehouse for consumption not more than 120 days before the question was presented to the Secretary, is subject to assessment of a special dumping duty. The special dumping duty is about equal to the difference between the purchase price or exporter's sales price, and the foreign market values.

In this action, after receipt of the plaintiff's complaint, the Secretary of the Treasury initiated an investigation which resulted in the publication of a determination that sales of portable electric typewriters from Japan were being or were likely to be sold at less than fair value. Thereupon the International Trade Commission conducted its

investigation and rendered a negative determination, i.e., that an industry in the United States is not being or likely to be injured, or prevented from being established, by reason of the less than fair value sales. In summary, the Commission reached a negative injury determination, and therefore no dumping finding was published.

One of the issues before the court is whether it has subject matter jurisdiction of an action brought by an American manufacturer challenging the correctness of a negative injury determination made by the International Trade Commission under the Antidumping Act of 1921, as amended.

This jurisdictional question, plaintiff's counsel asserts, is of "great significance not just to the plaintiff herein, but to the entire community of American manufacturers which have invoked or may invoke in the future the remedies provided by the Antidumping Act." Furthermore, plaintiff states that if the court decides affirmatively on the jurisdictional question, then a three-judge panel should also be impaneled to decide the substantive question whether the International Trade Commission, in reaching a negative injury determination, misconstrued and misapplied the pertinent statutes.

Defendant concurs in plaintiff's motion for a three-judge panel on the jurisdictional question, but it opposes assigning a three-judge panel to hear and determine the merits of the action. The party-in-interest, Brother International Corporation, the importer of record and consignee of the imported merchandise, agrees with defendant's position.

While defendant agrees that a three-judge panel should be designated by the chief judge to decide the jurisdictional issue, it emphasizes that plaintiff has made no showing that a decision on the merits would have "broad or significant implications in the administration or interpretation of the customs laws" within the statutory provision.

Apart from the assertion that the jurisdictional question is of great significance "to the entire community of American manufacturers," no other reason is stated in any of the briefs of the parties to support the request for a three-judge panel.

Under the provisions of section 255(a) the chief judge is authorized to designate a three-judge panel if he finds the conditions set forth in either of its two subdivisions. Pursuant to subdivision (1) the chief judge must find that the action raises an issue of constitutionality. Under subdivision (2) he must find that the case "has broad or significant implications in the administration or interpretation of the customs laws." Clearly, therefore, a party requesting a three-judge panel must establish the facts which warrant the finding.

An application for a three-judge panel under subdivision (2) should not be granted unless special or exceptional circumstances indicate

that the action has "broad or significant implications in the administration or interpretation of the customs laws." Surely it is not a sufficient reason to designate a three-judge panel that a case, by virtue of its precedential value, will affect other parties similarly situated. Even if the request is unopposed, the chief judge still must determine if the circumstances warrant impaneling a three-judge panel. See *United Merchants, Inc.* v. *United States*, 67 Cust. Ct. 601, C.R.D. 71–2, 328 F. Supp. 1403 (1971).

It is to be noted that 28 U.S.C. § 255 (1970) which provides for "Three-judge trials" is an exception to a primary objective of the Customs Courts Act of 1970 [1] which legislated the trial of customs cases by a single judge. That act, which modernized and strengthened the procedures before the United States Customs Court, represented a marked departure from past practice. Previously, a majority of cases were heard by a three-judge panel. The legislative history of the Customs Courts Act of 1970 clearly manifests that an objective of the act is to conserve judicial manpower and to reduce the procedural delays which resulted from the inability to dispose of all of the issues by a single judge.[2]

The present legislative policy is expressly set forth in 28 U.S.C. § 254 (1970) which declares that the "judicial power of the Customs Court with respect to any action, suit or proceeding shall be exercised by a single judge . . . ." [3] This provision reflects the congressional intent that only upon a showing of exceptional circumstances does the 1970 act contemplate the appointment of a three-judge panel.

A comparable legislative purpose is found in the history [4] of the recent amendment governing a three-judge panel in the United States district courts [Public Law 94–381]. Of particular interest is the restriction imposed upon its use to cases of congressional or state reapportionment, or when specifically required by act of Congress.

The interpretation and application of customs laws is the function and role of the United States Customs Court, and cases of novel impression are almost commonplace. Only a few decisions need be cited as examples of the far-reaching questions determined by a single-judge court in customs cases. In *Globemaster, Inc.* v. *United*

[1] Public Law 91–271.

[2] See House Report No. 91–1067, 91st Cong., 2d Sess. (1970).

[3] "§ 254. Single-judge trials.

Except as otherwise provided in section 255 of this title, the judicial power of the Customs Court with respect to any action, suit or proceeding shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges."

[4] Senate Report No. 94-204, on the amendment of a three-judge panel bill of the district courts, contains the comment that: "Three-judge court procedure has recently been termed by one scholar, 'the single worst feature in the Federal judicial system as we have it today.' It has imposed a burden on the Federal courts and has provided a constant source of uncertainty and procedural pitfalls for litigants."

States, 68 Cust. Ct. 77, C.D. 4340, 340 F. Supp. 974 (1972), the issue was whether the importer could be relieved of the statutory requirement of marking the country of origin upon imported merchandise by the payment of additional duty. In *Suwannee Steamship Company* v. *United States*, 70 Cust. Ct. 327, C.R.D. 73-3, 354 F. Supp. 1361 (1973), the question presented was whether this court had jurisdiction to review the discretionary authority conferred on the Secretary of Treasury in the remission of duties assessed on repairs made in foreign ports. In *American Customs Brokerage Co., Inc., a/c Astral Corp.* v. *United States*, 72 Cust. Ct. 245, C.D. 4546, 375 F. Supp. 1360 (1974), the court was called upon to determine what constitutes an "importation" within the meaning of the customs laws. In *Andrew Akins* v. *United States*, 76 Cust. Ct. 15, C.D. 4629, 407 F. Supp. 748, (1976), *aff'd*, 64 CCPA 68, C.A.D. 1185, 551 F. 2d 1222 (1977), the court held that article III of the Jay Treaty of 1794, under which plaintiff claimed exemption from imposition of customs duties, was abrogated by the War of 1812 and by subsequent inconsistent legislation by Congress. In *Pasco Terminals, Inc.* v. *United States*, 76 Cust. Ct. 204, C.D. 4658, 416 F. Supp. 1242 (1976), *appeal pending*, the court dismissed plaintiff's suit against the imposition of dumping duties on imported sulphur on the ground that the plaintiff lacked standing. In *Voss International Corp.* v. *United States*, 78 Cust. Ct. 130, C.D. 4698 (1977), the court held that the determination of injury by the Tariff Commission [now the International Trade Commission], achieved by a two to two vote of the five members of the Commission who attended the meeting, was valid under the provisions of 19 U.S.C. § 160(a)(1970). Indeed, cases raising issues involving the interpretation of the Antidumping Act of 1921 have been resolved exclusively by a single judge of this court. Some examples are: *Matsushita Electric Industrial Company, Ltd., et al.* v. *United States Treasury Department et al.*, 67 Cust. Ct. 328, C.D. 4292 (1971), *aff'd*, 60 CCPA 85, C.A.D. 1086, 485 F. 2d 1402(1973); *F. W. Myers & Co., Inc.*, v. *United States*, supra; *Azufrera Panamericana, S.A.* v. *United States*, 74 Cust. Ct. 97, C.D. 4591 (1975); *Pasco Terminals, Inc.* v. *United States, supra;* and *Voss International Corp.* v. *United States, supra.* Many other examples could be cited.

In the absence of a showing of special factors or circumstances that warrant the designation of a three-judge panel, the judicial power of the Customs Court shall be exercised by a single judge.

The plaintiff's motion that the chief judge designate a three-judge panel in this action is denied.

(C.R.D. 77-7)

G. COSIMANO *v.* UNITED STATES

Motion for summary judgment

Court No. R70/10046

Port of Washington, D.C.

[Motion denied.]

(Dated August 29, 1977)

Tompkins and Davidson for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

Memorandum Opinion and Order

WATSON, Judge: Plaintiff has moved for summary judgment in this dispute over the value for tariff purposes of certain articles of wearing apparel imported from Hong Kong in 1969 and appraised on the basis of constructed value [1] at 25% above the invoice prices. Plaintiff makes alternative claims of export value [2] and constructed value, both equal to the invoice unit prices.

Most of the articles are items of made-to-order clothing sold by Hong Kong Customs Tailors of Washington, D.C. (hereinafter HKCT) to its customers. HKCT obtained the made-to-order clothing as well as ready-made clothing from Mascot International, Ltd. of Kowloon, Hong Kong, a related company as defined in section 402(g)(2) of the Tariff Act of 1930, as amended.

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[1] Section 402(d), Tariff Act of 1930, as amended:

(d) CONSTRUCTED VALUE.—For the purposes of this section, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

[2] Section 402(b), Tariff Act of 1930, as amended:

(b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

Plaintiff bases its motion on the affidavits of HKCT's president (Keswani), Mascot's manager (Aildasani), an officer of a competing importer (Daswani), a partner of the latter's exporter (Lalwani), the plaintiff's customs broker (Cosimano), the responses to interrogatories made by the appraising official (Tyrrell), as well as the customer order forms for the custom-made articles and the invoice, cross referenced to bills for materials and tailoring changes.

Although this represents a considerable mass of information it fails to dispel a number of troubling questions and in the end falls short of demonstrating the absence of issues of material fact.

The error of the appraisement is apparent from the failure to follow the formula contained in section 402(d) of the Tariff Act of 1930, *Ellis Silver Co., Inc.* v. *United States*, 63 Cust. Ct. 647, R.D. 11688, 308 F. Supp. 704 (1969), *aff'd.*, 67 Cust. Ct. 564, A.R.D. 293 (1971), *aff'd*, 60 CCPA 143, C.A.D. 1100, 477 F.2d 946 (1973). See also, *United States* v. *A. N. Deringer, Inc.*, 46 Cust. Ct. 762, 768, A.R.D. 127 (1961), *appeal dismissed* 48 CCPA 169 (1961). The remainder of plaintiff's burden of proof, however, is not satisfied. As regards the claim of export value, the most basic considerations are left in a confused state. If, as appears to be the case, HKCT is a selected purchaser, it must prove the price it paid fairly reflected the market value of the merchandise. This is not accomplished by reference to the prices prevailing in the selected purchaser relationship between the competing firms represented by Daswani and Lalwani. There is no reason to believe those prices represent market value any more than the ones in dispute.

In the same vein, export value is not proved by showing the prices were 20% more than Mascot's costs. This is a variant of constructed value and is not the proof of price in the export market required by *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F.2d 1400 (1974).

To the extent the ready-made garments may be subject to separate consideration and conceivably possessed an export value based on their price being one at which such or similar merchandise was freely sold in Hong Kong for export to the United States within the meaning of section 402(b) of the Tariff Act of 1930, as amended, plaintiff's motion is deficient in proof of the price at which they may have been freely sold. Here too a simple showing that Mascot bought the ready-made articles on the Hong Kong wholesale market and sold them to HKCT at a price 20% higher is not proof of the price of such or similar merchandise *for export to the United States.*

The proof based on the conduct of the competing importer and exporter is triply deficient. First, the statements made as to the

similarity of the competitor's prices are unpersuasive considering the multiplicity of articles, the time elapsed since exportation, the variations in prices of the articles in dispute due to such things as special linings, sweat pads and relative size of garment, and the lack of substantiation from the competing deponent's invoices. Second, the focus of the affidavits is not on the prices themselves but on the *method* of pricing, i.e., the addition of about 20% of whatever were the exporter's costs. Third, even assuming the existence of firm proof as to the similarity of the prices in transactions between competitors, because the competing importer was a selected purchaser, the prices it paid are not persuasive proof of the market value of these articles.

In addition to these problems there exists a question as to exactly what constitutes the market for export to the United States for this type of merchandise, a point with consequences for proof of export value or constructed value. Plaintiff evidently takes the position that sales in quantities of 15 articles or more constitute the limiting characteristics of the relevant market. However, since these are sales of 15 different articles the question arises as to whether lumping them together creates a meaningful distinction from the market in which one article is sold at a time. The existence of a broader market than that envisaged by plaintiff would require a corresponding enlargement of its proof with respect to both export and constructed value.

In general plaintiff's supporting material appears to be somewhat better adapted to proof of constructed value than export value. However, in this area too, for a variety of reasons, it fails to support the granting of a motion for summary judgment. For some articles the elements of constructed value are not supplied at all. For others, either cost of materials or tailoring cost is missing. In no instance is there a separate calculation of the cost of containers and other expenses incidental to readying the merchandise for shipment to the United States. In addition the problem of whether Mascot and its competing exporter represent the entire class of those who sell such merchandise by virtue of their purported sales in quantities of 15 articles leaves open the question of just how broad need be the inquiry under section 402(d)(2) to determine the element of general expenses and profit in sales of merchandise of the same general class or kind.

In sum, this motion raises more questions than it answers and does not provide sufficient evidence to warrant the granting of summary judgment on either of the alternative claims.

For the above reasons, it is

ORDERED, that plaintiff's motion for summary judgment be, and the same hereby is, denied.

(C.R.D. 77-8)

ATAKA AMERICA, INC. v. UNITED STATES

Opinion on Plaintiff's Motion For Severance

Court No. 73-9-02625

Port of New York

[Plaintiff's motion granted.]

(Dated September 19, 1977)

Rode & Qualey (*Ellsworth F. Qualey* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

NEWMAN, Judge: Plaintiff has moved for an order severing a protest (No. 1001-2-041977) from this civil action; defendant opposes the motion.

In support of its application, plaintiff's counsel has submitted an affidavit averring *inter alia:* All entries covered by the civil action present a common question of law as to whether the merchandise is properly classifiable as medical optical instruments under item 709.05, TSUS, or as electro-medical apparatus under item 709.17, TSUS. The entries cover a number of articles having different model numbers, which reflect the existence of various attachments. Plantiff believes that the model GIF-D fiberscope, covered by protest No. 1001-2-041977, is the most representative of all the merchandise involved in the action. Model GIF-D was the subject of *United States* v. *Ataka America, Inc.*, 64 CCPA 60, C.A.D. 1184, 550 F .2d 33 (1977), *reh. denied* (May 5, 1977), which was decided adversely to plaintiff. Continuing, plaintiff further alleges that it intends to retry the issue in *Ataka;* and without severance, plaintiff would be required to introduce at trial testimony and expensive samples concerning each of the individual models. This, according to plaintiff's counsel, would be both unnecessarily time-consuming and costly.

While conceding that plaintiff has a right to retry the issues litigated in the prior *Ataka* case, defendant contends that the prior case is *stare decisis*. See, e.g., *Brentwood Originals* v. *United States*, 76 Cust. Ct. 195, C.D. 4655 (1976). Defendant further urges that plaintiff's motion should be denied since "the still extant issue of the proper classification of model numbers other than the GIF-D will not be resolved, but rather prolonged while plaintiff seeks a retrial on the GIF-D". Finally, defendant notes that this action is currently suspended under the prior *Ataka* case.

I have concluded that the requested severance will serve the interests of justice. Concededly, the doctrine of *stare decisis* is not a bar to a retrial. Whether or not the prior *Ataka* case will be dispositive here, depends, of course, upon what if any factual or legal distinctions the plaintiff is able to establish with reference to the prior case. *Herman D. Steel Co.* v. *United States*, 49 CCPA 30, C.A.D. 790 (1962). However, I am not persuaded that defendant would be seriously prejudiced by severing protest No. 1001–2–041977 for a separate trial on model GIF-D, thus permitting plaintiff to proceed with a minimum of expense and time. The court expresses no opinion as to whether the determination in the severed action relative to model GIF-D will be controlling of the classification of the models involved in the other protests covered by this action.

Under all the facts and circumstances, and in the exercise of discretion, plaintiff's motion is granted, and an order will be entered accordingly.

(C.R.D. 77–9)

ATAKA AMERICA, INC. *v.* UNITED STATES

Opinion on Plaintiff's Motion for Severance

Court No. 77–3–00472

Port of New York

[Plaintiff's motion granted.]

(Dated September 19, 1977)

Rode & Qualey (*Ellsworth F. Qualey* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

NEWMAN, Judge: Plaintiff has moved for an order severing a protest (No. 1001–6–009288) from this civil action; defendant opposes the motion.

In support of its application, plaintiff's counsel has submitted an affidavit averring, *inter alia:* All entries covered by the civil action present a common question of law as to whether the merchandise is properly classifiable as medical optical instruments under item 709.05, TSUS, or as electro-medical apparatus under item 709.17, TSUS. The entries cover a number of articles having different model numbers, which reflect the existence of various attachments. Heretofore, plaintiff tried a test case involving model GIF–D, which was decided adversely to plaintiff (*United States* v. *Ataka America, Inc.*, 64 CCPA 60, C.A.D. 1184, 550 F. 2d 33 (1977), *reh. denied* (May 5, 1977)). Plaintiff now desires to retry the issue of the prior *Ataka*

case, and as part of the retrial, plaintiff seeks not only to present testimony relative to model GIF–D, but also to present testimony respecting model GIF–D3, which "is representative of more recent instruments in this [fiber optic medical instruments] field". Continuing, plaintiff further alleges that without the requested severance, plaintiff would be required to introduce testimony and expensive samples concerning each of the individual models. This according to plaintiff's counsel, would be unnecessarily time-consuming and costly.

While conceding that each importation gives rise to a new cause of action, defendant nevertheless opposes plaintiff's motion, urging that the prior *Ataka* case is *stare decisis*. See, e.g., *Brentwood Originals* v. *United States*, 76 Cust. Ct. 195, C.D. 4655 (1976). Defendant also states in its opposing memorandum that "[t]he protest which plaintiff wants severed is not alleged to cover merchandise other than the GIF–D", and that model GIF–D3 is "admittedly not part of the importation upon which plaintiff seeks retrial".

A motion for severance by plaintiff, similar to that presently before me, was the subject of *Ataka America, Inc.* v. *United States*, 79 Cust. Ct. 171, C.R.D. 77–8 (1977), decided concurrently herewith. There, I concluded that under all the facts and circumstances in that situation a severance would serve the interests of justice, and defendant would not be seriously prejudiced by granting the motion. I have reached the same conclusion in the instant matter.

Contrary to defendant's statement in its opposing memorandum that model GIF–D3 is "admittedly not part of the importation upon which plaintiff seeks retrial", an examination of the invoices in the official court papers discloses that in point of fact model GIF–D3 was the very merchandise imported. However, in fairness to defendant it must also be pointed out that plaintiff's affidavit in support of its motion did not affirmatively allege that model GIF–D3 was covered by the shipment involved in the protest sought to be severed.

As in the companion matter, whether or not the prior *Ataka* case will be dispositive here, depends upon what if any factual or legal distinctions the plaintiff is able to establish with reference to the prior case. *Herman D. Steel Co.* v. *United States*, 49 CCPA 30, C.A.D. 790 (1962). And again, the court expresses no opinion as to whether the determination in the severed action will be dispositive of the classification of the models involved in the other protests covered by this action.

For the reasons indicated, and in the exercise of discretion, plaintiff's motion for severance of protest No. 1001–6–009288 is granted, and an order to that effect will be entered.

(C.R.D. 77-10)

WAY DISTRIBUTORS, INC. *v.* UNITED STATES

Motion for an order authorizing the taking of depositions and for further discovery

Court Nos. 73-4-00943 and 75-7-01812

Port of Boston

[Plaintiff's motion granted.]

(Dated August 29, 1977)

Doherty & Melahn (*William E. Melahn*, of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney) for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: Plaintiff having previously obtained the names of those involved in the formulation of ORR Ruling 202-71 by virtue of this court's order of March 8, 1976 (*Way Distributors, Inc.* v. *United States*, 76 Cust. Ct. 273, C.R.D. 76-1) now seeks to depose two of them.

In plaintiff's view this discovery relates to its claim that the merchandise in dispute was classified pursuant to guidelines contained in a rule promulgated by the United States Customs Service in violation of the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

Defendant, asserting a complete lack of merit to plaintiff's claim under the Administrative Procedure Act, characterizes the discovery sought as an attempt to explore the thought processes of the deponents.

At this stage of the proceeding and in this context the court cannot disregard the possibility of merit to plaintiff's claim nor can it assume that the desired discovery will be of an objectionable nature if it is properly conducted. The rules of the court provide adequate protection for the defendant and sufficient provision for the resolution of any concrete disputes which may arise during the taking of the depositions.

Upon reading and filing the motion for plaintiff, through its attorneys, Doherty & Melahn, to depose Arthur P. Schifflin, Acting Director, Division of Tariff Classification Rulings and Customs Chemist Irving Sporn, U.S. Customs Laboratory, New York City, and for an order requiring defendant United States to produce any available samples, books, worksheets, standard texts, treatises, guides, and any other tangible things pertaining to the classification and assessment

of duty of the merchandise involved in the instant action, and not previously produced, it is hereby,

ORDERED, that the motion is granted in all respects, and it is

FURTHER ORDERED, that the defendant United States shall cause both above employees to appear for purposes of taking depositions in the United States Customs Court, One Federal Plaza, New York, New York, 10007, in a room to be designated by a clerk of the court on September 26, 1977 at 11 a.m. or at such other date, time and place that may be mutually agreed to between the attorneys for the parties after consultation with the court, and it is

FURTHER ORDERED, that the clerk of the court shall make available, for review and use in examining the witnesses, the official papers which are the subject of this action, and it is

FURTHER ORDERED, that the defendant United States, through its designated officers or witnesses, produce for use in said examination, all samples, books, laboratory reports, worksheets, standard texts, treatises, guides, correspondence, or tangible things, if any, pertaining to the classification of the merchandise involved in the instant actions, if not previously produced, and it is

FURTHER ORDERED, that the plaintiff is to provide its own reportorial service at its own expense, and it is

FURTHER ORDERED, that this court order shall not preclude the attorneys for the respective parties from entering into a mutually agreeable stipulation pursuant to Rule 7.1 of the Rules of the United States Customs Court.

(C.R.D. 77-11)

INTERNATIONAL MERCANTILE CORP. *v.* UNITED STATES

Opinion on Defendant's Motion to Dismiss

Court No. 75-5-01050

Port of San Diego

[Motion denied.]

(Dated September 27, 1977)

Stein, Shostak, Shostak & O'Hara, Inc. (*Thomas R. Trager* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Sidney N. Weiss*, trial attorney), for the defendant.

NEWMAN, Judge: Defendant has moved pursuant to Rule 4.7(b) to dismiss this action for failure of the complaint to state a claim upon which relief may be granted. For the reasons indicated, the motion is denied.

A review of the summons and complaint clearly establishes that the issue presented for determination is whether the subject merchandise, certain mirror tiles, has a reflecting area of over one square foot. The complaint alleges *inter alia* that the mirror tiles measure "12$\frac{1}{16}$ inches square in total surface area" (paragraph 4), and that the merchandise is properly dutiable under item 544.54, TSUS, as modified by T.D. 68–9, which provision requires that the mirrors provided for therein be over one square foot in reflecting area.

Although the factual allegation of the complaint with reference to reflecting area has been drafted somewhat inartistically, I think it is reasonably clear from the pleading that plaintiff is alleging that the mirror tiles measure 12$\frac{1}{16}$ inches on each side (viz., 12$\frac{1}{16}$" x 12$\frac{1}{16}$"), and plaintiff is claiming the mirror tiles are over one square foot in reflecting area. Accordingly, plaintiff has stated a claim upon which relief may be granted. If defendant wished greater specificity or further delineation of the facts pertaining to the reflecting area of the mirror tiles, the appropriate step was a motion pursuant to Rule 4.7(d) to make more definite and certain. Moreover, I have noted that plaintiff has indicated in its opposing memorandum that a request for consent of defendant to amend the complaint was refused, which refusal is not denied in defendant's reply.

At this juncture, I wish to emphasize that I am fully cognizant of—and entirely appreciative of—the government's and the importer's respective problems in litigation. And furthermore, that my bent of mind is to obviate difficulties and hurdles that are purely technical in nature, which may cast an unnecessary burden on a party. *Cf. Superscope, Inc.* v. *United States*, 71 Cust. Ct. 301, C.R.D. 73–37 (1973). Here, in light of plaintiff's factual allegation that the imported mirror tiles are 12$\frac{1}{16}$ inches square and plaintiff's claim under item 544.54, TSUS, there is no doubt that plaintiff is claiming that the merchandise is over one square foot in reflecting area. Additionally, it is noted that the only difference between the provision under which the merchandise was assessed (item 544.51, TSUS) and the provision claimed to be correct by plaintiff (item 544.54, TSUS) is whether or not the mirror is over one square foot in reflecting area.

Under all the facts and circumstances, defendant's motion to dismiss is denied, and an order will be entered accordingly.

(C.R.D. 77-12)

WEBCOR ELECTRONICS DIV. OF U.S. INDUSTRIES, INC. *v.* UNITED STATES

OPINION AND ORDER ON DEFENDANT'S MOTION TO STRIKE "SECOND AMENDED COMPLAINT"

Court No. 73-1-00279

Ports of New York and Los Angeles

[Motion granted.]

(Dated September 29, 1977)

Serko & Simon for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*William F. Atkin*, trial attorney), for the defendant.

NEWMAN, Judge: Defendant has moved for an order striking plaintiff's "Second Amended Complaint", filed July 29, 1977, on the ground that it fails to comply with the court's rules. Plaintiff has interposed an opposition to defendant's motion. For the reasons indicated herein, defendant's motion to strike is granted.

Briefly, the background of the present matter before me is as follows: On July 6, 1977, the court entered an order directing *inter alia* the severance of two entries covered by the civil action (Nos. 108146 and 174027) and further ordered the filing of an amended complaint within thirty days. On July 29, 1977, plaintiff filed a document erroneously entitled "Second Amended Complaint" (this was, in fact, the first amendment): and *in one skimpy sentence*, the document states that plaintiff "amends its complaint to strike items 5 and 10 and Schedule B, all of which relate to Entry 108146, and to omit Protest 1001-2-011865 covering Entry 174027". No retained portion of the original complaint is repeated in the amended complaint.

Defendant correctly contends that plaintiff's so-called second amended complaint fails to comply with rule 4.8(c) of this court which, so far as is pertinent, requires an amended pleading to "include so much of the prior pleading as may be required to show clearly how the pleading is to stand amended". Further, as defendant accurately notes, plaintiff has mislabeled its amended complaint as "Second", when in fact it was the *first* amended complaint filed by it.

Plaintiff in its opposition readily concedes that its amended pleading should have been captioned "First Amended Complaint". However, plaintiff denies that copying the retained portions of the original complaint (paragraphs 1 through 4 and 6 through 9 and the schedule of protests) into the amended complaint is required for clarity. I am unable to agree.

It is evident from a reading of rule 4.8(c) that plaintiff has utterly failed to comply with either the letter or spirit of the rule, or with the direction in the court's order of July 6 to file an amended complaint. Obviously, when the court directed the filing of an amended pleading, it intended such pleading to comport with the requirements of its rules. Plaintiff's filing of a document merely striking certain material in the original complaint by reference to its "item" (paragraph) numbers and schedule listing, plainly is not a compliance with rule 4.8(c), or the court's order of July 6th.

Even though the purpose of the amended pleading is simply to delete certain material from a prior pleading, as in the instant case, nevertheless such amended pleading must conform with rule 4.8(c). Thus, pursuant to that rule, the amended pleading should reproduce or duplicate sufficient material retained from the original or prior pleading so as to clearly indicate *within the four corners of the amended pleading* how the pleading is to stand amended.

The objective of filing an amended pleading is not simply to apprise the court and the pleader's adversary as to a change in position, but also to present in a clear, comprehensive and unified manner the most current form of the pleader's allegations, without the necessity of referring back to the original or prior pleadings submitted in the action, which could cause confusion.

In sum, plaintiff's amended complaint does not indicate *within its four corners* how the original pleading is to stand amended, and consequently fails to comply with rule 4.8(c). It is evident, too, that were it simply necessary to strike the provisions relating to the entries referred to above, the court's order of July 6th, could have so directed.

At this juncture, I wish to emphasize that I am fully cognizant of—and entirely appreciative of—the government's and the importer's respective problems in litigation. And moreover, that my bent of mind is to obviate difficulties and hurdles that are purely technical in nature, which may cast an unnecessary burden on a party. Nonetheless, a plaintiff must, of course, observe the rules of pleading which have been prescribed by the court. Hence, under the particular circumstances here, I am constrained to grant defendant's motion to strike the "Second Amended Complaint"; and plaintiff is directed to file a second amended complaint in conformity with rule 4.8(c), bearing in mind the construction of that rule as enunciated in this memorandum opinion.

Accordingly, it is hereby ORDERED:

1. Defendant's motion to strike the document entitled "Second Amended Complaint" is granted.

2. Plaintiff shall have thirty (30) days after service of this opinion and order within which to file a second amended complaint in the form and manner prescribed by rule 4.8(c).

(C.R.D. 77-13)

FEUDOR, INC. *v.* UNITED STATES

Memorandum Opinion Accompanying Order

Court No. 75-5-01345

Port of New York

[Motion to dismiss denied.]

(Dated December 7, 1977)

Freeman, Meade, Wasserman & Schneider (*Bernard J. Babb* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Mark K. Neville, Jr.*, trial attorney), for the defendant.

BOE, Judge: The defendant has moved, pursuant to rule 4.7(b)(2), to dismiss this action for lack of subject matter jurisdiction. The merchandise involved consists of disposable butane lighters which were imported between September, 1972 and January, 1973. The various entries were liquidated between November, 1972 and February, 1973.[1] On July 2 and 15, 1974, the plaintiff filed written applications for reliquidation of the instant entries pursuant to section 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1). Reliquidation was refused on July 25, 1974. The plaintiff filed a protest from this refusal on October 22, 1974, which protest was denied on November 29, 1974. The plaintiff thereafter filed a summons commencing this action.

The jurisdiction of this court is set forth in section 1582 of title 28, United States Code, which provides in pertinent part:

§ 1582. Jurisdiction of the Customs Court.

> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: * * * (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.
>
> * * * * * * *
>
> (c) The Customs Court shall not have jurisdiction of an action unless (1) * * * a protest has been filed, as prescribed

[1] On or about July 1, 1970, prior to the importations involved herein, the plaintiff applied to the Commissioner of Customs for a valuation ruling to establish the proper basis of appraisement for the type of butane lighters involved in this case. Customs officials at the Port of New York and at the Bureau of Customs in Washington, D.C., agreed to withhold appraisement of such butane lighters until the valuation ruling was issued. On August 16, 1973, subsequent to the instant liquidations, the Bureau of Customs issued its valuation ruling, and instructed the area director of customs for the New York Seaport to appraise and liquidate all entries of the butane lighters consistent therewith.

> by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, * * * and (2) all liquidated duties, charges or exactions have been paid at the time the action is filed.

The protest in this case was filed within the 90-day limit contained in section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (b)(2)(B), having been filed on October 22, 1974, or 89 days after the appropriate customs officer refused to reliquidate the entries, in July 25, 1974. The protest was denied on November 29, 1974, in accordance with section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515(a). Subsequently, the plaintiff filed a summons in this court on May 23, 1975, within 180 days of the denial of the protest as is required by 28 U.S.C. § 2631(a)(1). All liquidated duties have been paid. In sum, the plaintiff has complied with all the prerequisites contained in the *jurisdictional* statutes of this court.

The defendant contends, however, that the plaintiff failed to comply with the reliquidation provisions of section 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1520(c)(1), and, therefore, that its protest was a nullity. Section 1520(c)(1) provides:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and mainfest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake or inadvertence *is brought to the attention of the customs service* within one year after the date of entry, or transaction, or within ninety days after liquidation or exaction when the liquidation or exaction is made more than nine months after the date of the entry, or transaction. [Emphasis added.]

The defendant argues that the plaintiff failed to file its application for reliquidation in a timely manner as provided by section 1520(c)(1), and, therefore, its subsequent protest had no legal effect.[2]

It is unnecessary at this juncture for this court to determine whether an "error, mistake, or inadvertence [was] brought to the attention

[2] The defendant's argument is based upon the assumption that only by filing a written application for reliquidation within the section 1520(c)(1) time limits could the plaintiff have a meritorious claim. Thus, since the plaintiff's written applications were not filed until July of 1974, well over one year after both the entry and liquidation of the subject merchandise, under the defendant's theory, the plaintiff's claim must fail. The plaintiff's complaint herein proceeds, however, upon a different theory. Though a written application for reliquidation is the normal course, the plaintiff argues that in the present case, the August 16, 1973 valuation ruling by the Bureau of Customs, directing liquidation according to its terms, "brought to the attention of the customs service" an "error, mistake, or inadvertence" in the prior liquidations. Since this ruling occurred less than one year after entry of the merchandise, the plaintiff contends that section 1520(c)(1) has been satisfied. Because of the court's determination of this motion, it is unnecessary to resolve the merits of these respective contentions.

of the customs service" within the time period prescribed by section 520(c)(1) of the Tariff Act of 1930. That question concerns the propriety of the refusal of the appropriate customs official to reliquidate the entries involved herein. Such an inquiry goes to the merits of this case, an inappropriate subject for resolution on a motion to dismiss for lack of jurisdiction. See *Madden Machine Co.* v. *United States*, 61 CCPA 97, C.A.D. 1130, 499 F. 2d 1294 (1974).

All that need concern the court at this point is the fact that reliquidation was refused. Under 19 U.S.C. § 1514(a)(7), this refusal, for *whatever* reason, was protestable. *Madden Machine Co.* v. *United States*, *supra*. As previously noted, in view of the fact that the instant protest was properly filed and denied, that a timely summons was filed, and that all liquidated duties have been paid, this court unquestionably has jurisdiction over the subject matter of this action. *Madden*, *supra*.

The defendant urges, however, that should this court determine that the requirements of section 1520(c)(1) relate to the merits of this case, it will be impossible for the defendant to obtain a speedy resolution of such alleged jurisdictional claims without the need to file an answer. The answers to this argument are apparent.

First, as the decision of our appellate court in the *Madden* case makes clear, the propriety of the refusal of the customs service to reliquidate does not raise the issue of the jurisdiction of this court. Rather, the propriety of the refusal is the very gravamen of this action.

Second, the defendant's suggestion that it must always file an answer to resolve issues such as that present herein is patently erroneous. Rule 4.7(b)(4) of the rules of this court provides for the interposition of a motion to dismiss for failure to state a claim upon which relief may be granted, which, pursuant to the rule, may be made before an answer is filed. It will be noted that the defendant implicitly recognizes the propriety of the motion to dismiss for failure to state a claim upon which relief can be granted in this case by stating in the last paragraph of its reply brief in the instant motion:

> In conclusion, it must be noted that plaintiff *has not validly stated a claim upon which relief might be granted*, even if it be assumed for argument's sake that plaintiff is properly before the Court. [Emphasis added.]

The defendant, however, has not chosen to predicate its motion to dismiss upon this ground as an alternative to its jurisdictional argument.

For the court to now treat the present motion to dismiss for lack of jurisdiction as an alternative motion alleging the failure to state a claim upon which relief can be granted would be manifestly unfair to the plaintiff. In its brief opposing the defendant's present motion,

the plaintiff has directed its attention solely to the jurisdictional contentions advanced by the defendant. The plaintiff's complaint raises an issue of statutory interpretation which is arguable, and certainly not frivolous. *See* Footnote #2, *ante*. To presently treat the instant motion to dismiss for lack of jurisdiction as one for failure to state a claim upon which relief may be granted would deny to the plaintiff its rightful opportunity to present argument in favor of its interpretation of section 1520(c)(1), 19 U.S.C. This the court will not do.

Therefore, the defendant's motion to dismiss for lack of jurisdiction is denied without prejudice with the right reserved the defendant to file any other appropriate motion or an answer including therein such affirmative defenses.

Let an order be entered accordingly.

226-879—78——14

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/110	Maletz, J. July 6, 1977	Tilford Imports, Inc., dba Karol Western Corp.	75-3-00750	Item 737.90 17.5%	Item 734.20 5.5%	Judgment on the pleadings	Los Angeles Pachinko game sets
P77/111	Watson, J. July 7, 1977	Sol Spitz Co., Inc.	74-5-01284, etc.	Item 748.21 42.5%	Item 642.97 9.5% or 8.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	New York Chenille stems
P77/112	Maletz, J. July 7, 1977	Osawa & Co. (U.S.A.), Inc.	75-1-00208, etc.	Item 734.77 7.5% on full value of assembled golf clubs	Items 734.77/807.00 7.5% on full value of clubs, less cost or value of U.S. products (shafts and grips) Cost or value of U.S. products: 51¢ ea. f.o.b. U.S. (ladies' grips); 54¢ ea. f.o.b. U.S. (men's grips); $1.20 ea. f.o.b. U.S. (shafts: woods); $1 ea. f.o.b. U.S. (shafts: irons)	Agreed statement of facts	San Francisco American goods returned; shafts and grips; U.S. components of golf clubs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/113	Boe, J. July 7, 1977	Fibre Metal Pacific, Inc.	76-4-00954	Item 705.50 25%	Item 705.35 15%	Agreed statement of facts	Los Angeles Gloves of horsehide or cowhide (except calfskin) leather
P77/114	Maletz, J. July 11, 1977	A. N. Deringer, Inc.	75-4-00936	Item 692.35 5.5%	Item 692.30 Free of duty	Judgment on the pleadings	Champlain-Rouses Pt. (Ogdensburg) Tree Farmer tractors (model No. C5D)
P77/115	Maletz, J. July 11, 1977	Nu-Car Driveaway, Inc.	76-3-00779	Items 807.00/ 692.02 and 945.69 25% (Canadian trailer); entered duty-free (American truck-tractor)	Item 692.27 4% (trailer) Tractor is instrument of international trade not subject to duty (19 U.S.C. 1322; 19 C.F.R. 123.16(a))	Agreed statement of facts	Detroit Automobile trailer imported from Canada, pulled by automobile tractor of American origin
P77/116	Maletz, J. July 11, 1977	Nu-Car Driveaway, Inc.	76-3-00834	Items 807.00/ 692.02 and 945.69 25% (Canadian trailer); entered duty-free (American truck-tractor)	Item 692.27 4% (trailer) Tractor is instrument of international trade not subject to duty (19 U.S.C. 1322; 19 C.F.R. 123.16(a))	Agreed statement of facts	Detroit Automobile trailer imported from Canada, pulled by automobile tractor of American origin

P77/117	Maletz, J. July 11, 1977	Nu-Car Driveaway, Inc.	76-8-01883	Items 806.20/ 692.02 and 945.69 25% (Canadian trailer); entered duty-free (American truck-tractor)—entry 75-927935 Items 807.00/ 692.02 and 945.69 25% (Canadian trailers); entered duty-free (American truck-tractors)—remaining entries	Item 692.27 4% (trailers) Tractors are instruments of international trade not subject to duty (19 U.S.C. 1322; 19 C.F.R. 123.16(a))	Agreed statement of facts	Detroit Automobile trailers imported from Canada pulled by automobile tractors of American origin
P77/118	Ford, J. July 12, 1977	Israeli Art Craft Import Co., Inc., et al.	75-8-01929, etc.	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/119	Ford, J. July 12, 1977	WMF of America, Inc., et al.	74-12-03326, etc.	Item 653.37 9.5%	Item 653.35 5%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Brass candlesticks
P77/120	Boe, J. July 22, 1977	Pengo International	75-5-01053	Item 737.40 17.5%	Item 734.20 5.5%	Judgment on the pleadings	Los Angeles Jackpot slot machines with dummy coins
P77/121	Ford, J. July 25, 1977	Albert Kessler & Co. et al.	68/69179, etc.	Item 653.37 17%, 15% or 13% Item 653.40 19%	Item 653.35 10.5%, 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/122	Boe, J. July 25, 1977	Bombardier, Ltd.	72-8-01863	Item 692.35 6.5% Item 948.00 10%	Item 692.30 Free of duty	U.S. v. F. W. Myers & Co., Inc. (C.A.D. 1097)	Champlain-Rouses Pt. (Ogdensburg) Tractors and parts of tractors
P77/123	Watson, J. July 26, 1977	Volvo Western Distributing Co.	74-12-03388	Item 409.00 4¢ per lb. + 27%	Item 405.25 1.6¢ per lb. +10.5%	Volkswagen of America, Inc. v. U.S. (C.D. 4348, aff'd C.A.D. 1115)	Los Angeles Paints for automobile parts
P77/124	Maletz, J. July 26, 1977	F. W. Woolworth	74-10-02692	Item 700.60 20%	Item 700.55 6%	Agreed statement of facts	Philadelphia Ladies slippers
P77/125	Watson, J. July 27, 1977	Sol Spitz Co., Inc.	75-9-02420, etc.	Item 748.21 42.5%	Item 642.97 12%, 9.5% or 8.5%	Hub Floral Corporation v. U.S. (C.D. 4669)	New York Chenille stems
P77/126	Maletz, J. July 27, 1977	F. W. Woolworth Co.	74-10-02863	Item 700.60 20%	Item 700.55 6%	Agreed statement of facts	San Francisco Ladies slippers
P77/127	Ford, J. August 2, 1977	Israel Designs et al.	75-8-01926, etc.	Item 653.37 11% or 9.5%	Item 653.35 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/128	Boe, J. August 2, 1977	Cavalier Label	77-5-00813	Item 382.60 21% + 25¢ per lb.	Item 382.42 7.5%	Judgment on the pleadings	New York Ladies coats in c.v. of linen

P77/129	Ford, J. August 9, 1977	Arthur J. Humphreys, Inc.	70/55227, etc.	Item 207.00 15%, 13%, 11.5%, 10% or 8% (fence sections and fence gates marked "A") Item 202.54 7%, 6% or 5% (corner adapters and cleats marked "A"; fence posts marked "B")	Item 200.75 Free of duty (items marked "A") Item 200.60 Free of duty (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Sumas (Seattle) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")
P77/130	Ford, J. August 9, 1977	Arthur J. Humphreys, Inc., et al.	71-10-01381, etc.	Item 207.00 11.5% (fence sections and fence gates marked "A") Item 202.54 5% (corner adapters and cleats marked "A"; fence posts marked "B")	Item 200.75 Free of duty (items marked "A") Item 200.60 Free of duty (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Sumas (Seattle) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")
P77/131	Newman, J. August 16, 1977	Fedtro, Inc.	69/18044, etc.	Item 682.60 15% or 13%	Item 688.40 11.5% or 10%	Fedtro, Inc. v. U.S. (C.D. 4548)	New York Multipurpose battery chargers
P77/132	Newman, J. August 16, 1977	Fedtro, Inc.	71-6-00197-S, etc.	Item 682.60 15% and 10%	Item 688.40 11.5% and 8%	Fedtro, Inc. v. U.S. (C.D. 4548)	New York Multipurpose battery chargers

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/133	Ford, J. August 31, 1977	The Wing On Co. et al.	72-1-00002, etc.	Item 653.37 17%, 15%, 13%, 11% or 9.5% Item 653.40 19%	Item 653.35 9%, 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/134	Ford, J. September 1, 1977	Cost Plus, Inc., et al.	71-11-01682, etc.	Item 653.37 17%, 15%, 13%, 11% or 9.5% Item 653.40 19%	Item 653.35 10.5%, 9%, 8%, 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/135	Ford, J. September 2, 1977	Pier I Imports of Texas, Inc.	70/18984, etc.	Item 653.37 15% or 13%	Item 653.35 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Houston Candlesticks, candleholders, etc.
P77/136	Ford, J. September 2, 1977	J. T. Steeb & Co. et al.	70/54638, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Portland, Oreg. Candlesticks, candleholders, etc.
P77/137	Watson, J. September 2, 1977	Camp-Ways, Inc.	76-10-02290	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P77/138	Ford, J. September 7, 1977	Border Brokerage Co., Inc.	71-10-01377, etc.	Item 207.00 11.5% (fence sections,	Item 200.75 Free of duty (items	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items mark-	Blaine (Seattle) Red cedar fence sections, fence gates, etc. (items

				fence gates, corner adapters and cleats marked "A") Item 202.54 5% (fence posts marked "B")	marked "A") Item 200.60 Free of duty (items marked "B")	ed "A" and "B")	marked "A") Wood fence posts (items marked "B")
P77/139	Ford, J. September 7, 1977	Norman G. Jensen, Inc.	74-1-00036	Item 207.00 15%, 13%, 11.5%, 10% or 8% (fence sections, fence gates, corner adapters and cleats marked "A") Item 202.54 7%, 6% or 5% (fence posts marked "B")	Item 200.75 Free of duty (items marked "A") Item 200.60 Free of duty (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Portal (Pembina) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")
P77/140	Ford, J. September 15, 1977	Pier I Imports of Texas, Inc.	71-12-02051, etc.	Item 653.37 13%, 11%, or 9.5%	Item 653.35 7%, 6%, or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Houston Candlesticks, candleholders, etc.
P77/141	Landis, J. September 15, 1977	J. E. Bernard & Co., Inc.	66/9893	Item 722.50 35%	Item 682.10 12.5% (entry no. 29313); protest dismissed as to entry no. 5412	Judgment on the pleadings	Chicago Oscillator coil

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/142	Newman, J. September 15, 1977	International Electronics Corp.	72-9-01985-8	Item 948.00 10% additional duty pursuant to Pres. Proc. 4074 (eff. 8/16/71)	Merchandise exported from country of origin before 12:01 a.m. 8/16/71; exempt from additional duty under headnote 5(h), subpart C, part 2 of appendix to TSUS (Trsy. Dept. Order No. 3, 8/31/71)	Agreed statement of facts	New York Electrolytic capacitors
P77/143	Richardson, J. September 20, 1977	General Instrument Corporation	76-5-01090, etc.	Item 687.60 6%, without allowance for cost or value of U.S. components	Items 687.60/807.00 6%, with cost or value of U.S. fabricated components deductible from full value of imported merchandise Entry K289973 severed and dismissed for lack of jurisdiction; returned to	U.S. v. Texas Instruments Incorporated (C.A.D. 1178)	New York American goods returned; integrated circuits; U.S. components (chips)

					regional commissioner for other administrative action not inconsistent with judgment		
P77/144	Richardson, J. September 20, 1977	F. W. Myers & Co., Inc.	75-1-00064-S	Item 608.05 0.3¢ per lb.	Item 608.02 Duty-free	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. (Ogdensburg); Port Huron (Detroit); Buffalo "Atomet 28", a sponge iron powder
P77/145	Richardson, J. September 20, 1977	F. W. Myers & Co., Inc.	75-8-01975-S	Item 608.05 0.3¢ per lb.	Item 608.02 Duty-free	F.W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. (Ogdensburg) "Atomet 28", a sponge iron powder
P77/146	Richardson, J. September 20, 1977	F. W. Myers & Co., Inc.	75-12-03254-S	Item 608.05 0.3¢ per lb.	Item 608.02 Duty-free	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. and Alexandria Bay (Ogdensburg) "Atomet 28", a sponge iron powder
P77/147	Richardson, J. September 20, 1977	F. W. Myers & Co., Inc.	76-5-01192-S	Item 608.05 0.3¢ per lb.	Item 608.02 Duty-free	F.W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. (Ogdensburg) "Atomet 28", a sponge iron powder
P77/148	Ford, J. September 29, 1977	The American Import Co.	71-6-00446	Item 653.37 15%	Item 653.35 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Philadelphia Candlesticks, candleholders, etc.
P77/149	Watson, J. September 29, 1977	Camp-Ways, Inc.	74-6-01428	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/150	Watson, J. October 4, 1977	Regency Flowers, Inc.	69/50245, etc.	Item 748.20 25%	Item 774.60 13.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	New York Artificial flowers, etc., of plastics
P77/151	Richardson, J. October 11, 1977	F. W. Myers & Co., Inc.	72-10-02151-S	Item 608.05 0.3¢ per lb.	Item 608.02 12¢ per ton	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit "Atomet 28", a sponge iron powder
P77/152	Richardson, J. October 11, 1977	F. W. Myers & Co., Inc.	73-1-00290-S	Item 608.05 0.3¢ per lb;	Item 608.02 Duty-free	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit "Atomet 28", a sponge iron powder
P77/153	Landis, J. October 11, 1977	Irving Raincoat Co., Inc.	69/47120, etc.	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	New York Boots, arctics, etc., and various synthetic rubber articles
P77/154	Landis, J. October 11, 1977	Irving Raincoat Co., Inc.	70/53571	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	San Francisco Boots, arctics, etc., and various synthetic rubber articles
P77/155	Landis, J. October 11, 1977	Irving Raincoat Co., Inc.	70/53572	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	San Francisco Boots, arctics, etc., and various synthetic rubber articles

P77/156	Richardson, J. October 12, 1977	F. W. Myers & Co., Inc.	74-8-02206-S	Item 608.05 0.3¢ per lb.	Item 608.02 12¢ per ton (1971 entries); duty-free (1972 entries and thereafter)	F. W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. (Ogdensburg); Buffalo-Niagara Falls (Buffalo) "Atomet 28", a sponge iron powder
P77/157	Richardson, J. October 13, 1977	F.W. Myers & Co., Inc.	72-8-01761-S	Item 608.05 0.3¢ per lb.	Item 608.02 25¢ per ton and 12¢ per ton	F.W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit "Atomet 28", a sponge iron powder
P77/158	Richardson, J. October 13, 1977	F.W. Myers & Co., Inc.	72-12-02513-S	Item 608.05 0.3¢ per lb.	Item 608.02 25¢ per ton (1970 entries); duty-free (1972 entries)	F.W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Detroit "Atomet 28", a sponge iron powder
P77/159	Richardson, J. October 13, 1977	F.W. Myers & Co., Inc.	74-6-01543-S	Item 608.05 0.3¢ per lb.	Item 608.02 Duty-free	F.W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. and Alexandria Bay (Ogdensburg) "Atomet 28", a sponge iron powder
P77/160	Richardson, J. October 13, 1977	F.W. Myers & Co., Inc.	74-7-01910-S	Item 608.05 0.3¢ per lb.	Item 608.02 12¢ per ton and 25¢ per ton	F.W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. (Ogdensburg); Buffalo-Niagara Falls (Buffalo) "Atomet 28", a sponge iron powder
P77/161	Richardson, J. October 13, 1977	F.W. Myers & Co., Inc.	75-3-00746-S	Item 608.05 0.3¢ per lb.	Item 608.02 Duty-free (1972 entries and thereafter); 12¢ per ton (1971 entries)	F.W. Myers & Co., Inc. v. U.S. (C.D. 4635)	Champlain-Rouses Pt. (Ogdensburg); Buffalo-Niagara Falls (Buffalo) "Atomet 28", a sponge iron powder

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/162	Landis, J. October 17, 1977	Davies, Turner & Co.	65/0879, etc.	Item 774.60 17% Item 774.25 12.5%	Item 773.25 10%	U.S. v. Hancock Gross, Inc. (C.A.D. 1153)	Philadelphia Washers; gaskets of rubber or plastics
P77/163	Landis, J. October 17, 1977	Davies, Turner & Co.	65/0885	Item 774.60 17% Item 774.25 12.5%	Item 773.25 10%	U.S. v. Hancock Gross, Inc. (C.A.D. 1153)	Philadelphia Washers; gaskets of rubber or plastics
P77/164	Landis, J. October 17, 1977	Irving Raincoat Co., Inc.	63/10304	Par. 216 15% Pars. 1559(a)/ 1537(b) 12.5%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Los Angeles Boots and various synthetic rubber articles
P77/165	Landis, J. October 17, 1977	Irving Raincoat Co., Inc.	63/23122	Par. 216 15% Pars. 1559(a)/ 1537(b) 12.5%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Los Angeles Boots and various synthetic rubber articles
P77/166	Landis, J. October 17, 1977	Irving Raincoat Co., Inc.	66/4501	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Galveston Boots and various synthetic rubber articles
P77/167	Landis, J. October 17, 1977	Irving Raincoat Co., Inc.	66/52231	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	New Orleans Boots and various synthetic rubber articles

P77/168	Landis, J. October 17, 1977	Weather-Rite Sportswear Co., Inc.	60/24021	Par. 216 15% Par. 1559(a)/ 1537(b) 12.5%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Los Angeles Manufactures of synthetic rubber, synthetic rubber rainwear, etc.
P77/169	Maletz, J. October 17, 1977	F. W. Woolworth Co.	74-0-02438	Item 740.38 27.5%	Item 737.90 17.5%	Koons Wilson & Co. v. U.S. (T.D. 42729)	San Francisco Little girls' dress-up sets
P77/170	Landis, J. October 18, 1977	Academy Sporting Goods, Inc.	66/68549	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169	New York Boots and various synthetic rubber articles
P77/171	Landis, J. October 18, 1977	Irving Raincoat Co., Inc.	66/308	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	New Orleans Boots and various synthetic rubber articles
P77/172	Landis, J. October 18, 1977	Irving Raincoat Co., Inc.	66/4500	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Galveston Boots and various synthetic rubber articles
P77/173	Landis, J. October 18, 1977	Irving Raincoat Co., Inc.	67/12944	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Seattle Boots and various synthetic rubber articles
P77/174	Landis, J. October 18, 1977	Irving Raincoat Co., Inc.	67/52996	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Seattle Boots and various synthetic rubber articles
P77/175	Landis, J. October 18, 1977	Irving Raincoat Co., Inc.	68/10065	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Baltimore Boots and various synthetic rubber articles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/176	Landis, J. October 20, 1977	Irving Raincoat Co., Inc.	66/54686	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, a'f'd C.A.D. 1169)	New Orleans Boots and various synthetic rubber articles
P77/177	Landis, J. October 20, 1977	Weather-Rite Sportswear Co., Inc.	62/6083	Par. 216 15%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	New York Rubberized black raincoats
P77/178	Landis, J. October 20, 1977	Weather-Rite Sportswear Co., Inc.	64/3149	Par. 216 15% Pars. 1559(a)/ 1537(b) 12.5%	Par. 1558 8.5%	Sumitomo Shoji New York, Inc. v. U.S. (C.D. 4595, aff'd C.A.D. 1169)	Los Angeles Boots and various synthetic rubber articles
P77/179	Watson, J. October 20, 1977	G & S Metal Products, Inc.	75-7-01876	Item 654.10 8.5% + 1.7¢ per lb.	Item 661.35 5%	Judgment on the pleadings	Baltimore Aluminum ice cube trays
P77/180	Ford, J. October 25, 1977	Morris Friedman & Co.	64/11128	Par. 397 15%	Par. 339 10%	Ignaz Strauss & Company, Inc. v. U.S. (C.A.D. 923)	Philadelphia Candlesticks
P77/181	Ford, J. October 25, 1977	Norman G. Jensen, Inc.	74-3-00850	Item 692.35 5.5%	Item 692.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	International Falls—Ranier (Duluth) Tree Farmer tractors
P77/182	Watson, J. October 25, 1977	Montgomery Ward & Co.	75-5-01089	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Stereo phono 8-track assembly

P77/183	Ford, J. October 26, 1977	Union Brokerage Co.	76-5-01287	Item 207.00 11.5% (fence sections, fence gates, corner adapters, and cleats marked "A") Item 202.54 5% (fence posts marked "B")	Item 200.75 Duty-free (items marked "A") Item 200.60 Duty-free (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Portal (Pembina) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")
P77/184	Watson, J. October 26, 1977	Brentwood Originals	70/9321, etc.	Items 366.60 and 366.63 40% or 50% (items marked "A") Item 365.78 50% or 46% (items marked "B")	Item 363.30 12.5% (items marked "A") Item 363.01 45% or 42.5% (items marked "B")	Brentwood Originals v. U.S. (C.D.'s 4572, 4655)	Los Angeles Cotton covers for bolsters and bedrests
P77/185	Ford, J. October 27, 1977	E & L Truck Rental Company	76-9-02172	Items 807.00/ 692.02 and 945.69 25% (Canadian trailer); entered duty-free (American truck-tractor)	Item 692.27 4% (automobile trailer) Truck-tractor is instrument of international traffic not subject to duty (19 USC 1322; 19 CFR 123.16(a))	Agreed statement of facts	Detroit Automobile trailer imported from Canada, pulled by an automobile tractor of American origin

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
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P77/186	Ford, J. October 27, 1977	Norman G. Jensen, Inc./ North Pacific Lumber Co.	72-6-01334, etc.	Item 207.00 15%, 13%, 11.5%, 10% or 8% (fence sections and fence gates marked "A") Item 202.54 7%, 6% or 5% (corner adapters and cleats marked "A"; fence posts marked "B")	Item 200.75 Duty-free (items marked "A") Item 200.60 Duty-free (items marked "B")	Arthur J. Humphreys, Inc. v. U.S. (C.D. 4588, aff'd C.A.D. 1168) (items marked "A" and "B")	Portal (Pembina); Sumas (Seattle); International Falls (Duluth) Red cedar fence sections, fence gates, etc. (items marked "A") Wood fence posts (items marked "B")
P77/187	Ford, J. October 27, 1977.	C. J. Tower & Sons of Buffalo, Inc.	76-11-02615	Items 692.02/ 945.69 25%	Item 692.27 4%	Agreed statement of facts	Port Huron (Detroit) Automobile trailer imported from Canada, pulled by an automobile truck-tractor of American origin; truck-tractor is instrument of international traffic not subject to duty
P77/188	Ford, J. October 27, 1977	United China & Glass Co.	75-6-01508	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New Orleans Brass illuminating articles

P77/189	Ford, J. November 8, 1977	Lilli Ann Corporation	75-4-00776	Item 382.81 25¢ per lb. + 27.5%	Item 382.87 10%	Agreed statement of facts	New York Leather and fabric ladies coats
P77/190	Ford, J. November 8, 1977	United China & Glass Co.	76-5-01213	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New Orleans Brass illuminating articles
P77/191	Richardson, J. November 8, 1977	Raytheon Company	76-4-00981	Item 687.60 6%	Items 807.00/ 687.60 6% upon value of each integrated circuit less declared value of prefabricated U.S. manufactured die as set forth in schedule attached to decision and judgment	U.S. v. Texas Instruments Incorporated (C.A.D. 11-78)	San Francisco American goods returned; integrated circuits; U.S. fabricated components
P77/192	Ford, J. November 9, 1977	Montgomery Ward & Company	75-7-01775	Item 380.84 25¢ per lb. + 27.5%	Item 376.56 16.5%	Judgment on the pleadings	San Francisco Girl's plastic coated nylon twill snorkel jackets (entries 116111, 118932, 11-352, 115448)
P77/193	Ford, J. November 15, 1977	Bruce Duncan Co., a/c Hong Horizons, Inc.	76-6-01483	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass illuminating articles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/194	Ford. J. November 15, 1977	Transamerican Import & Export Co. et al.	66/45277, etc.	Par. 1531 20%	Par. 353 12.5% Radio cases and radios not appraised as entireties, appraisements and liquidations void; protests premature and dismissed; entries ordered returned to appropriate customs officer for administrative action	Judgment on the pleadings Lafayette Radio Electronics Corp. v. U.S. (C.A.D. 977)	Chicago Radio cases imported with radios; entireties
P77/195	Ford, J. November 15, 1977	United China & Glass Co.	73-1-00155	Item 653.37 13% or 11%	Item 653.35 7% or 6%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New Orleans Brass candlesticks
P77/196	Landis, J. November 15, 1977	Doranne of California	75-5-01270	Item 365.82 20% less 20% (1973 entries, TD 53965); 20% (1974 entries)	Item 366.84 6.5%	Agreed statement of facts	Los Angeles Hemp hangers and abaca plant hangers
P77/197	Boe, J. November 15, 1977	Maple Leaf Fish Co.	76-8-01936	Item 113.25 15%	Item 113.20 10%	Agreed statement of facts	Detroit "Related cooked smelt, diamond cod, diamond haddock, fish fries, and P/C cod"

P77/198	Boe, J. November 15, 1977	Sentry Shoe Co. Div. of Genesco	74-10-02698	Item 700.60 20%	Item 700.55 7%	Agreed statement of facts	New York Vinyl sandals
P77/199	Ford, J. November 22, 1977	The Westminster Corp.	74-1-00116	Item 772.30 12.5%	Item 774.60 8.5%	The Westminster Corp. v. U.S. (C.D. 4687)	Baltimore Vinyl uppers
P77/200	Ford, J. November 22, 1977	The Westminster Corp.	74-10-02875	Item 772.30 12.5%	Item 774.60 8.5%	The Westminster Corp. v. U.S. (C.D. 4687)	Baltimore Vinyl uppers
P77/201	Boe, J. November 23, 1977	Hub Floral Corp.	75-8-02139	Item 748.21 42.5%	Item 642.97 8.5%	Judgment on the pleadings	Boston Chenille stems
P77/202	Watson, J. November 29, 1977	Aceto Chemical Co., Inc.	72-2-00264	Item 409.00 4.9¢ per lb. +31%	Item 425.36 7%	U.S. v. Aceto Chemical Co., Inc. (C.A.D. 1186)	New York Zinc thiocarbamate with small amount of wetting agent
P77/203	Watson, J. November 29, 1977	Fedco, Inc.	76-12-02726	Item 389.60 25¢ per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P77/204	Watson, J. November 29, 1977	Standard Sales, Inc.	77-3-00444	Item 389.60 25¢ per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P77/205	Boe, J. November 29, 1977	Seaway Forwarding Co.	68/25506	Item 680.54 15%	Item 692.27 8.5%	Agreed statement of facts	Cleveland Unmachined castings of pearlitic iron
P77/206	Watson, J. November 30, 1977	Champion Industries, Inc., et al.	76-12-02845, etc.	Item 389.60 25¢ per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Philadelphia Backpacking tents

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
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P77/207	Watson, J. November 30, 1977	Fedco, Inc., et al.	71-9-01173, etc.	Item 389.60 25¢ per lb. +15%, 18% or 21%	Item 735.20 10%, 12% or 14%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P77/208	Watson, J. November 30, 1977	George Kerson Company et al.	71-11-01700, etc.	Item 389.60 25¢ per lb. + 21%, 18% or 15%	Item 735.20 14%, 12% or 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Seattle; Houston; San Francisco Backpacking tents
P77/209	Boe, J. November 30, 1977	Elliott & Hutchins, Inc.	75-4-00937	Item 692.16 5%	Item 692.30 Free of duty	Judgment on the pleadings	Champlain-Rouses Pt. (Ogdensburg) Bombardier Muskeg Tractor Jimmy Skidders and blades therefor
P77/210	Ford, J. December 19, 1977	David Chow & Company	68/68502	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass candlesticks
P77/211	Ford, J. December 19, 1977	The Little Jones Co., Inc.	75-11-02781	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass illuminating articles
P77/212	Richardson, J. December 19, 1977	New York Merchandise Co., Inc.	69/44578, etc.	Item 653.39 19%	Item 688.40 10% or 9%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	San Diego Star treetops, circle treetops, etc.

P77/213	Richardson, J. December 19, 1977	Raytheon Company	76-6-01499	Item 687.60 6%	Items 687.60/807.00 6% upon value of integrated circuit less declared values of prefabricated U.S. manufactured die, wire, frame, base and cap, as set forth in schedule attached to decision and judgment	U.S. v. Texas Instruments Incorporated (C.A.D. 1178)	San Francisco American goods returned; integrated circuits; U.S. components
P77/214	Richardson, J. December 19, 1977	Wild Heerbrugg Instruments, Inc., et al.	74-10-02907, etc.	Item 708.73 22.5%	Item 708.80 15%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Microscope frames and mountings
P77/215	Watson, J. December 19, 1977	Fedco, Inc.	76-8-01873	Item 389.60 25¢ per lb.+15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P77/216	Boe, J. December 19, 1977	The Jordan International Co.	73-9-02522	Item 608.87 8% Item 948.00 10%	Item 608.87 8%	Agreed statement of facts	Chicago Hot-rolled steel sheets, pickled, not alloy
P77/217	Ford, J. December 21, 1977	Hallmark Cards, Inc.	70/44409, etc.	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Kansas City (St. Louis) Brass candlesticks

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/218	Watson, J. December 21, 1977	Standard Surplus Sales, Inc., et al.	71-8-00959, etc.	Item 389.60 25¢ per lb.+ 15%, 18%, 21% or 24%	Item 735.20 10%, 12%, 14% or 16%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Tents
P77/219	Re, C. J. December 28, 1977	Automotive Tire Service, Inc.	67/67493	Item 772.51 8.5%	Item 772.50 Free of duty	Judgment on the pleadings	Boston Tires
P77/220	Re, C. J. December 28, 1977	Automotive Tire Service, Inc.	67/67496	Item 772.51 8.5%	Item 772.50 Free of duty	Judgment on the pleadings	Boston Tires
P77/221	Re, C. J. December 28, 1977	Automotive Tire Service, Inc.	68/50761	Item 772.51 8.5%	Item 772.50 Free of duty	Judgment on the pleadings	Boston Tires
P77/222	Re, C. J. December 29, 1977	Automotive Tire Service, Inc.	68/57904	Item 772.51 8.5%	Item 772.50 Free of duty	Judgment on the pleadings	Boston Tires
P77/223	Re, C. J. December 29, 1977	Automotive Tire Service, Inc.	69/22646	Item 772.51 8.5%	Item 772.50 Free of duty	Judgment on the pleadings	Boston Tires
P77/224	Ford, J. December 29, 1977	Bruce Duncan Co., Inc. Hong Horizons, Inc.	69/30423	Item 653.37 17%	Item 653.35 9%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Los Angeles Brass candlesticks

P77/225	Ford, J. December 29, 1977	The Wing On Co. et al.	67/23153, etc.	Item 653.37 17%, 15% or 13% Item 653.40 19%	Item 653.35 10.5%, 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/226	Watson, J. December 29, 1977	American Import Co.	75-7-01716	Item 748.20 21%	Item 774.60 8.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Philadelphia Merchandise in c.v. of plastic (artificial flowers)
P77/227	Watson, J. December 29, 1977	Hub Floral Corp.	73-5-01218	Item 748.21 42.5%	Item 642.97 11%	Hub Floral Corporation v. U.S. (C.D. 4669)	Boston Wire covered with textile material (chenille stems)
P77/228	Watson, J. December 29, 1977	Mobay Chemical Company	75-7-01782	Item 405.25 9%+1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578)	Chicago Desmocoll 400
P77/229	Maletz, J. December 29, 1977	Mego Corp.	66/38834, etc.	Item 737.90 35%	Item 734.55 15% (model No. 99) Item 735.05 15% (model No. 95)	Mego Corp. v. U.S. (C.D. 4614)	New York Model No. 99 (vinyl baseball glove; baseball glove and mitt) Model No. 95 (vinyl boxing glove)

ABSTRACTS OF CUSTOMS COURT DECISIONS
REAPPRAISEMENTS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/54	Maletz, J. July 6, 1977	F & D Trading Corp.	R67/15930	Cost of production	3349.00 DM (1 model 113); 3436.40 DM each (18 model 117); invoice unit price (5 miscellaneous models)	Judgment on the pleadings	New York Volkswagen automobiles (model nos. 113, 117, etc.)
R77/55	Maletz, J. July 6, 1977	F & D Trading Corp.	R67/17202	Cost of production	3494.48 DM each (3 model 113)	Judgment on the pleadings	New York Volkswagen automobiles (model no. 113)
R77/56	Maletz, J. July 6, 1977	F & D Trading Corp.	R68/1669	Cost of production	3363.00 DM each (9 model 113); invoice unit value (2 model 311)	Judgment on the pleadings	New York Volkswagen automobiles (model nos. 113, 311)
R77/57	Maletz, J. July 6, 1977	F & D Trading Corp.	R68/9061	Cost of production	3868.23 DM each (23 model 113); 3948.19 DM each (5 model 117)	Judgment on the pleadings	New York Volkswagen automobiles (model nos. 113, 117)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/58	Maletz, J. July 6, 1977	F & D Trading Corp.	R68/9062	Cost of production	3868.23 DM each (22 model 113); 3946.19 DM each (3 model 117)	Judgment on the pleadings	New York Volkswagen automobiles (model nos. 113, 117)
R77/59	Maletz, J. July 7, 1977	Daisy-Heddon, Division of Victor Comptometer Corporation	74-10-02883	Export value	Full f.o.b. values of merchandise, i.e., the invoiced ex-factory unit values, plus shipping charges, plus buying commission	Agreed statement of facts	Houston Toy guns
R77/60	Watson, J. July 12, 1977	Sandor, Inc.	R65/15007, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R77/61	Watson, J. July 12, 1977	Sandoz, Inc.	R65/17458, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/62	Watson, J. July 12, 1977	Sandoz, Inc.	R65/17474, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/63	Richardson, J. July 28, 1977	Lone Star Finance Corp.	R64/7951	Cost of production	DM3344.00	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (type 113)
R77/64	Richardson, J. July 28, 1977	Patrick & Graves	R65/24553, etc.	Cost of production	As specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (model nos. 113, 117)

R77/65	Richardson, J. July 28, 1977	Service Trust Company	R65/7369	Cost of production	DM3344.00	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (type 1200, model 113)
R77/66	Watson, J. August 2, 1977	Sandos, Inc.	R65/16033, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/67	Watson, J. August 2, 1977	Sandoz, Inc.	R66/974, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/68	Boe, J. August 2, 1977	World Mart, Inc.	R64/24029	Export value	F.o.b. unit invoice prices plus 20 per centum of difference between f.o.b. unit invoice prices and appraised values as noted on commercial invoices	Agreed statement of facts	Miami Stainless steel flatware

R77/69	Ford, J. August 8, 1977	H. A. & J. L. Wood	75-5-01211, etc.	Export value	Various invoice values less duty or other non-dutiable charges included in said invoice values.	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters, car warmers, etc.
R77/70	Newman, J. August 8, 1977	Great Empire Corp.	R66/10004	Cost of production	DM3371.33 each	Summary judgment	New York Volkswagen automobiles (7 model No. 117)
R77/71	Newman, J. August 8, 1977	Great Empire Corp.	R68/9049	Cost of production	DM3868.23 each (5 model 113); DM5185.-00 each (4 model 311); DM3949.19 (1 model 117); invoice unit value, each (5 model 361)	Summary judgment	New York Volkswagen automobiles (model Nos. 113, 311, 117, 361)
R77/72	Newman, J. August 8, 1977	Great Empire Corp.	R68/9051	Cost of production	DM3868.23 each (15 model 113); DM3946.-19 each (15 model 117)	Summary judgment	New York Volkswagen automobiles (model Nos. 113, 117)
R77/73	Newman, J. August 9, 1977	F & D Trading Corp.	R67/20115	Cost of production	DM3868.00 each	Judgment on the pleadings	Baltimore Volkswagen automobiles (9 model No. 113)
R77/74	Newman, J. August 9, 1977	F & D Trading Corp.	R68/9481	Cost of production	DM3868.23 each (12 model 113); DM3948.19 each (2 model 117)	Judgment on the pleadings	New York Volkswagen automobiles (model Nos. 113, 117)
R77/75	Newman, J. August 9, 1977	Great Empire Corp.	R68/9050	Cost of production	DM3946.19 each (2 model 117); invoice unit value, each (8 model 361)	Judgment on the pleadings	New York Volkswagen automobiles (model Nos. 117, 361)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/76	Watson, J. August 16, 1977	Philip J. Bernstein Enterprises	R62/3297, etc.	Export value	Set forth in schedule A attached to decision and judgment	Agreed statement of facts	Miami 6 transistor radios with cases; batteries
R77/77	Watson, J. August 16, 1977	Given International, Inc.	R68/17177, etc.	Cost of production	Invoiced unit prices, f.o.b. Japan	Given International, Inc. *v.* U.S. (C.D. 4624)	Los Angeles Lathes and accessories
R77/78	Newman, J. August 16, 1977	F & D Trading Corp.	R67/20118	Cost of production	DM3868.23 each (8 model 1300 and 16 model 1200); DM3948.98 each (8 model 117)	Summary judgment	Baltimore Volkswagen automobiles
R77/79	Newman, J. August 16, 1977	F & D Trading Corp.	R67/20119	Cost of production	DM 3868.23 each (12 model 113); DM3946.19 each (47 model 117)	Summary judgment	Baltimore Volkswagen automobiles
R77/80	Newman, J. August 16, 1977	F & D Trading Corp.	R68/14128	Cost of production	DM3871.63 each (8 model 113); DM3948.60 each (3 model 117)	Summary judgment	New York Volkswagen automobiles
R77/81	Newman, J. August 16, 1977	F & D Trading Corp.	R69/765	Cost of production	DM3871.63 each (7 model 113); DM4288.47 each (2 model 117); invoice unit value (1 model 361)	Summary judgment	New York Volkswagen automobiles
R77/82	Newman, J. August 16, 1977	Great Empire Corp.	R68/9055	Cost of production	DM3868.23 each (5 model 113); DM3946.19 each (9 model 117)	Summary judgment	New York Volkswagen automobiles

R77/83	Newman, J. August 16, 1977	Great Empire Corp.	R68/9477	Cost of production	DM3868.23 each (5 model 113); DM3946.19 each (4 model 117); invoice unit value, each (4 model 361)	Summary judgment	New York Volkswagen automobiles
R77/84	Newman, J. August 17, 1977	F & D Trading Corp.	R67/8143	Cost of production	DM3349.00 each (42 model 113); DM3436.30 each (65 model 117)	Summary judgment	New York Volkswagen automobiles
R77/85	Newman, J. August 17, 1977	F & D Trading Corp.	R67/19087	Cost of production	DM3590.97 each (6 model 113); DM3666.55 each (2 model 117)	Summary judgment	New York Volkswagen automobiles
R77/86	Newman, J. August 17, 1977	F & D Trading Corp.	R67/19088	Cost of production	DM3590.97 each (73 model 113); DM3666.55 each (10 model 117); DM4974.53 each (13 model 311); DM5044.74 each (16 model 361); DM5068.40 (1 model 313)	Summary judgment	New York Volkswagen automobiles
R77/87	Newman, J. August 17, 1977	Great Empire Corp.	R68/9478	Cost of production	DM3868.23 each (5 model 113); DM3946.19 each (16 model 117)	Summary judgment	New York Volkswagen automobiles
R77/88	Newman, J. August 17, 1977	Great Empire Corp.	R69/6272	Cost of production	DM3871.63 each (26 model 113); DM3948.60 (1 model 117)	Summary judgment	Baltimore Volkswagen automobiles
R77/89	Rao, J. August 24, 1977	Carolina Imports, Inc.	R66/15114, etc.	Cost of production	Specified in column designated "Claimed Value" in schedule B attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Savannah Volkswagen automobiles (model Nos. 113, 117, etc.)

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/90	Rao, J. August 25, 1977	Patrick & Graves	R65/13997, etc.	Cost of production	Specified in column designated "Claimed Value" in schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles (model Nos. 113, 117)
R77/91	Newman, J. August 25, 1977	Great Empire Corp.	R68/9474	Cost of production	DM3871.63 each	Summary judgment	New York Volkswagen automobiles ("used 1968 1300")
R77/92	Watson, J. September 2, 1977	Geigy Chemical Corporation	R69/11382, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.-1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32% or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R77/93	Richardson, J. September 7, 1977	H. W. Robinson Air Freight Corp., a/c Jaymar Ruby, Inc., et al.	R64/21607, etc.	Constructed value	Appraised values less $0.36 per yard.	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York "Elastic weavings", "new belt elastic waistband", "cotton elastic webbing", or "elastic tissues"
R77/94	Watson, J. September 7, 1977	Geigy Chemical Corporation	R70/1585, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.-1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind: less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32% or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/95	Richardson, J. September 8, 1977	Jaymar Ruby, Inc.	R65/2561, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Elastic tissues", "elastic weavings", "cotton elastic webbing", or "elastic fibre"

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/96	Richardson, J. September 8, 1977	Jaymar Ruby, Inc	R66/472, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Chicago "Elastic weavings, new belt", "elastic webbings, new belt", etc.
R77/97	Watson, J. September 8, 1977	Sandor, Inc.	R65/22920, etc.	United States value	U.S. selling prices, less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/98	Newman, J. September 8, 1977	Yamaha International Corp.	R68/1580	Cost of production	Equal to invoiced unit values without addition of 9.09% added by appraising official.	Judgment on the pleadings	Los Angeles Spare parts and/or accessories for Yamaha Motorcycles

R77/99	Richardson, J. September 9, 1977	World Mart, Inc.	R66/27708, etc.	Export value	F.o.b. unit invoice prices plus 20 per centum of difference between f.o.b. unit invoice prices and appraised values as noted on commercial invoices	Agreed statement of facts	Miami Stainless steel flatware
R77/100	Watson, J. September 9, 1977	Geigy Chemical Corporation	R70/5571, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.-1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32% or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/101	Watson, J. September 12, 1977	Geigy Chemical Corporation	R68/09065, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/102	Watson, J. September 12, 1977	Geigy Chemical Corporation	R68/18907, etc	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/103	Watson, J. September 12, 1977	Geigy Chemical Corporation	R70/1740, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32% or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/104	Watson, J. September 13, 1977	Geigy Chemical Corporation	R68/05173, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/105	Watson, J. September 13, 1977	Geigy Chemical Corporation	R68/18914, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or	U.S. v. Geigy Chemical Corporation et al (C.A.D. 1155)	New York Benzenoid dyestuffs

					kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/106	Watson, J. September 15, 1977	Geigy Chemical Corporation	R68/15470, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/107	Watson, J. September 15, 1977	Geigy Chemical Corporation	R69/03880, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement: less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/108	Watson, J. September 15, 1977	F. W. Myers & Company, Inc.	75-5-00996	Export value	$27.00 per CWT less 1% cash discount, less freight of $1.45 per CWT (Canadian currency), less brokerage and duty included	Agreed statement of facts	Port Huron (Detroit) Titanium dioxide pigments
R77/109	Rao, J. September 26, 1977	F &D Trading Corp.	R69/285, etc.	Cost of production	As listed in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Volkswagen automobiles

R77/110	Rao, J. September 26, 1977	Snuffy Smith Motors, Inc., et al.	R61/21471, etc.	Cost of production	As listed under column designated "Claimed Values Per Unit" in schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Americanized Volkswagen automobiles
R77/111	Rao, J. September 27, 1977	G. L. Smith d/b/a Snuffy Smith Motor Co.	R62/14780, etc.	Cost of production	As listed under column designated "Claimed Values Per Unit" in schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Americanized Volkswagen automobiles
R77/112	Watson, J. September 27, 1977	Geigy Chemical Corporation	R66/08748, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/113	Watson, J. September 27, 1977	Geigy Chemical Corporation	R69/01878, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/114	Watson, J. September 27, 1977	Geigy Chemical Corporation	R70/02032, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/115	Rao, J. September 28, 1977	Snuffy Smith Motors, Inc.	R62/1178, etc.	Cost of production	As listed under column designated "Claimed Values Per Unit" in schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D.1089)	Houston Americanized Volkswagen automobiles
R77/116	Rao, J. September 28, 1977	Snuffy Smith Motor Co.	R63/7081, etc.	Cost of production	As listed under column designated "Claimed Values Per Unit" in schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D.1089)	Houston Americanized Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/117	Watson, J. September 28, 1977	Geigy Chemical Corporation	R68/03780, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/118	Watson, J. September 28, 1977	Geigy Chemical Corporation	R70/07351, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of	U.S. v. Geigy Chemical Corporation et al. (C.A.D.1155)	New York Benzenoid dyestuffs

					kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.28 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/119	Watson, J. September 29, 1977	Mayer Textile Machine Corp.	75–10–02502, etc.	Export value	Equal to appraised value, less 33⅓% thereof (less ocean freight and insurance)	Agreed statement of facts	New York Various parts of textile machines
R77/120	Watson, J. September 29, 1977	Sandoz, Inc., et al.	73–12–03501, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 31.1% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.32 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/121	Rao, J. October 4, 1977	F & D Trading Corp.	R65/25302, etc.	Cost of production	As listed in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Volkswagen automobiles
R77/122	Watson, J. October 4, 1977	Geigy Chemical Corporation	R66/24368, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/123	Watson, J. October 4, 1977	Geigy Chemical Corporation	R68/07184, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general ex-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		New York Benzenoid dyestuffs
R77/124	Watson, J. October 4, 1977	Sandoz, Inc.	R65/22903, etc.	United States value	U.S. selling prices, less 23.8% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/125	Watson, J. October 6, 1977	Geigy Chemical Corporation	R66/06666, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/126	Watson, J. October 6, 1977	Geigy Chemical Corporation	R69/05765, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1555)	New York Benzenoid dyestuffs

					in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/127	Watson, J. October 12, 1977	Philip J. Bernstein Enterprises	R64/11956, etc.	Export value	F.o.b. unit invoice prices plus 20 percent of difference between f.o.b. unit prices and appraised values as noted on commercial invoices	Agreed statement of facts	Miami Stainless steel flatware
R77/128	Ford, J. October 27, 1977	Boutique Wigs, Inc. of Texas	75-6-01595	Export value	$1.10 each	Agreed statement of facts	Houston Wiglets
R77/129	Ford, J. October 27, 1977	F. W. Myers & Company, Inc.	74-7-02012	Constructed value	$27.00 per CWT less 1% cash discount, less freight of $1.45 per CWT (Canadian Currency), less brokerage and duty included	Agreed statement of facts	Port Huron (Detroit) Titanium dioxide pigments

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/130	Landis, J. November 9, 1977	Strombecker Corp.	R68/6126, etc.	Constructed value	Ex-factory invoice unit price, net, packed, plus appraised value of tooling charges	Strombecker Corp. v. U.S. (C.D. 4653)	Chicago Electrical equipment, games, road race sets, gloves, models, toys and parts of all the foregoing
R77/131	Watson, J. November 9, 1977	Geigy Chemical Corporation	R65/19626 etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/132	Watson, J. November 9, 1977	Geigy Chemical Corporation	R67/03945 etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/133	Watson, J. November 9, 1977	Geigy Chemical Corporation	R67/14884 etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/134	Watson, J. November 9, 1977	Geigy Chemical Corporation	R67/18900, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/135	Landis, J. November 10, 1977	Strombecker Corp.	R69/13402, etc.	Constructed value	Ex-factory invoice unit price, net, packed, plus appraised value of tooling charges	Strombecker Corp. v. U.S. (C.D. 4653)	Chicago Electrical equipment, games, road race sets, gloves, models, toys and parts of all the foregoing
R77/136	Watson, J. November 10, 1977	Geigy Chemical Corporation	R66/02750, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					appraisement; less 33.4% representing		
					profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/137	Watson, J. November 10, 1977	Geigy Chemical Corporation	R67/09686, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/138	Watson, J. November 10, 1977	Geigy Chemical Corporation	R67/17902, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/139	Watson, J. November 11, 1977	Geigy Chemical Corporation	R66/22452, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dye-	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					stuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/140	Watson, J. November 11, 1977	Geigy Chemical Corporation	R67/10185, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/141	Watson, J. November 11, 1977	Geigy Chemical Corporation	R68/00837, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/142	Watson, J. November 11, 1977	Geigy Chemical Corporation	R68/10980, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/143	Watson, J. November 14, 1977	Geigy Chemical Corporation	R66/24898, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement, less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/144	Watson, J. November 14, 1977	Geigy Chemical Corporation	R67/02720, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/145	Watson, J. November 14, 1977	Geigy Chemical Corporation	R67/03496, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement, less 32.6% representing profit and general expenses usually made in U.S. on sales of	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/146	Watson, J. November 14, 1977	Geigy Chemical Corporation	R67/06585, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement, less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/147	Watson, J. November 14, 1977	Geigy Chemical Corporation	R68/03018, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/148	Watson, J. November 14, 1977	Geigy Chemical Corporation	R70/1923, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/149	Ford, J. November 15, 1977	B & K Instruments, Inc.	R65/25155, etc.	Export value	Invoice unit prices less, where applicable, items previously deducted from invoice unit prices by appraising officer as saved packing, for merchandise specified in column headed "Contested Items" on schedule attached to decision and judgment	Agreed statement of facts	Cleveland Instruments and parts
R77/150	Rao, J. November 22, 1977	Lone Star Finance Corp.	R65/23181, etc.	Cost of production	Specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R77/151	Rao, J. November 23, 1977	J. C. Cox, Inc.	R65/23190, etc.	Cost of production	Specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/152	Rao, J. December 21, 1977	Rickwood Motors	R66/15112, etc.	Cost of production	At values specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Savannah Volkswagen automobiles
R77/153	Rao, J. December 21, 1977	R. W. Smith, a/c Jattke & Capels	R67/19513, etc.	Cost of production	At values specified in column designated "Claimed Value" on schedule B attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R77/154	Watson, J. December 21, 1977	Ciba Chemical and Dye Company	R70/7380, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 29.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.28 or such other	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/155	Rao, J. December 27, 1977	Carolina Imports, Inc.	R67/16939, etc.	Cost of production	At values specified in column designated "Claimed Value" on schedule B attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Charleston Volkswagen automobiles
R77/156	Watson, J. December 27, 1977	Geigy Chemical Corporation	R66/05793, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/157	Watson, J. December 27, 1977	Geigy Chemical Corporation	R67/05817, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/158	Rao, J. December 28 1977	Page & Jones, Inc.	R65/23012	Cost of production	DM3363.00 each (15 model 1964; 10 model 1965)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Mobile Volkswagen automobiles marked "A" as well as 1964 model Volkswagen automobiles not marked
R77/159	Watson, J. December 28, 1977	Geigy Chemical Corporation	R67/09033, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

					profit and general ex-		

					profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R77/160	Watson, J. December 28, 1977	Geigy Chemical Corporation	R67/09203, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	REAP NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/161	Watson, J. December 28, 1977	Geigy Chemical Corporation	R69/5674, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/162	Watson, J. December 28,	Geigy Chemical Corporation	R69/05768, etc.	United States value	U.S. selling prices, less 1% cash discount as	U.S. v. Geigy Chemical Corporation et al.	New York Benzenoid dyestuffs

R77/162	Watson, J. December 28, 1977	Geigy Chemical Corporation	R69/05768, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R77/163	Rao, J. December 29, 1977	Patrick & Graves	R65/7721, etc.	Cost of production	At values specified in column designated "Claimed Value" on schedule attached to decision and judgment	U.S. v. F & D Trading Corp. (C.A.D. 1080)	Houston Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	REAP NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/164	Watson, J. December 29, 1977	Geigy Chemical Corporation	R66/18192, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

An amendment to rule 14.3(b)(1) has been approved by the court. The amended rule, effective October 1, 1977, will read as follows (new language underscored):

RULE 14.3 ACCESS TO AND WITHDRAWAL OF PAPERS

* * * * * * *

(b) Temporary Withdrawal:

(1) Except where restricted by law (28 U.S.C. § 2637(b)), any person may have access to the relevant papers in an action other than entries, invoices and laboratory reports, which shall be available only to the attorney of record or a party to the action.

The clerk may provide copies of relevant papers to any person upon payment of the fees prescribed in Rule 14.5; except, copies of the transcript in any proceeding may be obtained only from the appropriate court reporter at the fee which he is allowed to receive by direction of the court.

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C.D. 4713 through C.D. 4717
C.D. 4719 through C.D. 4727

Valuation

C.D. 4712
C.D. 4715*
C.D. 4718
C.D. 4721*

Rules

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*C.D. 4715 and C.D. 4721 involve classification and valuation issues.

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ALTERNATIVE CLAIM, DEFENDANT'S
BURDEN OF PROOF (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).

ALUMINUM PLATES COATED WITH PHOTOSENSITIVE PLASTIC (*see* PLATES, FOR PRINTING, C.D. 4707).

AMERICAN GOODS RETURNED
DUTY, ENTRY FREE OF (*see* AMERICAN GOODS RETURNED, C.D. 4715).

FREE ENTRY

Plaintiff contested the appraisement of certain mushroom packs in glass jars imported from Taiwan, claiming the lids or caps on the mushroom jars were of American origin and therefore entitled to free entry by virtue of either item 800.00 or item 807.00, Tariff Schedules of the United States. It contended the appraised value of the merchandise should be reduced by an amount equal to the value of the alleged American-made lids, and that the dutiable value of the merchandise should not include the cost of certain supervision expenses which were alleged to have occurred after the mushrooms were packed. Defendant contended that the Customs Court lacked jurisdiction to review plaintiff's claims under items 800.00 and 807.00 since these are classification provisions and plaintiff's protests were directed solely to appraisement of the merchandise; and further that the subject merchandise was ineligible for a reduction in dutiable value because plaintiff failed to comply with certain regulations of the Secretary of the Treasury for American goods returned.

On the record presented, the court held that a claim in the protest alleging the dutiable value should be reduced by the value of the American-made lids was sufficient to inform customs officials of a claim under item 807.00; that the application of item 807.00 to this case preempted reliance upon item 800.00; that plaintiff failed to comply with the document requirements of section 10.1(g) of the regulations, an absolute precondition to recovery under item 807.00; that plaintiff did not qualify for the late filing of documents under Customs Regulation 10.112; and that it failed to sustain its burden of proof on the issue as to whether the dutiable value of the merchandise should be reduced by the value of certain supervision costs. Accordingly, the presumptively correct appraisements were sustained. *Green Giant Co.*, C.D. 4715 61

JURISDICTION (*see* AMERICAN GOODS RETURNED, C.D. 4715).

LIDS FOR GLASS JARS (*see* AMERICAN GOODS RETURNED, C.D. 4715).

MARINE CLEANSER (*see* AMERICAN GOODS RETURNED, C.D. 4727).

UNTIMELINESS OF CLAIM

A certain shipment of marine cleanser was classified under item 405.35, Tariff Schedules of the United States, the provision covering "Products * * * chiefly used for any one or combination of the following purposes: as detergents, wetting agents, emulsifiers, dispersents, or foaming agents." Plaintiff claimed the merchandise was entitled to free entry under TSUS item 800.00 as American goods returned.

AMERICAN GOODS RETURNED—Continued Page
UNTIMELINESS OF CLAIM—Continued
Plaintiff asserted that it had filed a timely protest under sec. 514 of the Tariff Act of 1930, against the Bureau of Customs' classification within 60 days after liquidation, which protest it alleged was lost by Customs; that it had filed a timely request for reliquidation under sec. 520(c) of the Tariff Act of 1930, which request allegedly was not acted upon until almost five years later when it was denied; and that a timely protest was then filed against the assessment of duties under item 405.35, which protest challenged Customs' refusal of plaintiff's request for reliquidation, rather than the liquidation.
On the record presented the court found that in fact a protest had not been filed under sec. 514 contesting the liquidation of the merchandise under item 405.35; that the request for reliquidation, filed eight months after liquidation, was untimely; and that a timely protest had not been filed under sec. 514 against Customs' refusal to reliquidate under sec. 520(c). Holding plaintiff's claim to be time-barred, the court noted that it was unnecessary to reach the merits of the case, i.e., whether or not plaintiff was entitled to relief under sec. 520(c). Accordingly, plaintiff's claim was overruled. *James Loudon & Co., Inc.*, C.D. 4727 ---------- 149

AMPUL INSPECTION MACHINES
MACHINES NOT SPECIALLY PROVIDED FOR
Certain "Rota" ampul inspection machines were classified under item 710.90, Tariff Schedules of the United States, as "Optical measuring or checking instruments and appliances not provided for elsewhere in subpart C, D or F of this part [part 2, schedule 7], and parts thereof: * * * Other". Plaintiff advanced four alternative claims:—under item 678.50, providing for "Machines not specially provided for"; under item 662.20, providing for parts of "machinery for filling, closing, sealing, capsuling, or labelling bottles, cans, boxes, bags, or other containers"; under item 708.85, covering "Hand magnifiers, magnifying glasses * * * and similar articles"; and under item 708.91, covering frames and mountings for articles provided for in item 708.85.
On the record presented and the legislative history the court held that the merchandise which was used by pharmaceutical manufacturers to inspect sealed glass containers filled with injectable drugs, but did not check for the correctness of any form of measurement, was erroneously classified under TSUS item 710.90. Plaintiff's claim as machines not specially provided for under item 678.50 was sustained and its claims under items 662.20, 708.85 and 708.91 were dismissed. *Corning Glass Works*, C.D. 4716 ---------- 72
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BURDEN OF PROOF
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CHILI PEPPERS
ANAHEIM AND ANCHO PEPPERS
Certain chili peppers exported from Mexico were classified under item 161.80, Tariff Schedules of the United States, the provision for anaheim and ancho peppers, and were claimed to be classifiable under TSUS item 161.83, the provision for peppers other than anaheim and ancho peppers.
The court found that the classification of the imported peppers as anchos was supported by the evidence in that record, and that plaintiff had failed to present evidence to rebut that classification. Accordingly, the action was dismissed. *Rudolph Miles & Sons, Inc., a/c Thomas P. Gonzalez Corp.*, C.D. 4711 ---------- 45
CHRISTMAS ORNAMENTS, OTHER (*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).
COASTER BRAKES
BICYCLE PARTS
Certain single-speed bicycle wheel hubs incorporating brakes, invoiced as bicycle drum brakes, were classified under items 807.00 and 732.36, Tariff Schedules of the United States, as parts of bicycles other than frames. The importations were claimed to be classifiable under TSUS items 807.00 and 912.10, as drum brakes, duty free. On the record presented, the court found that the braking mechanism in the imported wheel hubs was commonly known as a coaster brake, rather than a drum brake, and held the imported merchandise to be properly classified under the broad provision for bicycle parts in item 732.36, there being no provision in item 912.10 for coaster brakes *per se*. Accordingly, plaintiff's action was dismissed. *The Bendix Corporation*, C.D. 4721 ---------- 108
CONSOLIDATION (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
CONSTRUCTION
ADMINISTRATIVE PROCEDURE ACT
Sec. 701(a)(2) (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
Sec. 706(2)(A) (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
CODE OF FEDERAL REGULATIONS
Title 19
Sec. 10.1(a) (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Sec. 10.1(g) (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Sec. 10.112 (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Sec. 174.14 (*see* MOTION TO SEVER AND DISMISS, C.D.'s 4722, 4725).
Sec. 174.15 (*see* MOTION TO SEVER AND DISMISS, C.D.'s 4722, 4725).
CUSTOMS COURTS ACT OF 1970, PUBLIC LAW 91-271 (84 STAT. 274) (*see* MOTION TO SEVER AND DISMISS, C.D. 4722).
PRESIDENTIAL PROCLAMATION No. 4074
(*see* MOTION TO DISMISS ACTION, C.D. 4724).
(*see* MOTION TO SEVER AND DISMISS, C.D. 4725)
PUBLIC LAW 89-241, SEC. 77, 79 STAT. 933 (see UNFINISHED TOOTHBRUSHES, C.D. 4705).

CONSTRUCTION—Continued
RULES OF THE U.S. CUSTOMS COURT
Rule 8.2 (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
Rule 10.3(a) (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
TARIFF ACT OF 1922, PAR. 466 (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
TARIFF ACT OF 1930
Par. 466 (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
Par. 514 (*see* AMERICAN GOODS RETURNED, C.D. 4727).
Par. 520(c) (*see* AMERICAN GOODS RETURNED, C.D. 4727).
Par. 1615(a) (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Sec. 514 (*see* MOTION TO DISMISS ACTION, C.D. 4724).
TARIFF SCHEDULES OF THE UNITED STATES
General Headnotes and Rules of Interpretation
10(c) (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).
10(e) (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).
10(e)(i)
(*see* PETROLEUM DERIVATIVE, C.D. 4719).
(*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).
10(h)
(*see* MOTION FOR REHEARING, C.D. 4714).
(*see* PLATES, FOR PRINTING, C.D. 4707).
(*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
10(ij)
(*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
(*see* PLATES, FOR PRINTING, C.D. 4707).
11 (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Item
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161.83 (*see* CHILI PEPPERS, C.D. 4711).
382.00 (*see* WOMEN'S COTTON GAUZE SHIRTS, C.D. 4726).
382.33 (*see* WOMEN'S COTTON GAUZE SHIRTS, C.D. 4726).
403.60 (*see* RIMACTANE, C.D. 4713).
405.35 (*see* AMERICAN GOODS RETURNED, C.D. 4727).
407.85 (*see* RIMACTANE, C.D. 4713).
437.32 (*see* RIMACTANE, C.D. 4713).
475.25 (*see* PETROLEUM DERIVATIVE, C.D. 4719).
475.35 (*see* PETROLEUM DERIVATIVE, C.D. 4719).
657.15 (*see* SHIP MODELS, C.D. 4710).
661.30 (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).
662.20 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
666.25 (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).
668.20 (*see* PLATES, FOR PRINTING, C.D. 4707).
668.38
(*see* MOTION FOR REHEARING, C.D. 4714).
(*see* PLATES, FOR PRINTING, C.D. 4707).
668.50 (*see* PLATES, FOR PRINTING, C.D. 4707).
678.50
(*see* AMPUL INSPECTION MACHINES, C.D. 4716).
(*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
(*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
(*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
685.30 (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
685.50 (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
688.40
(*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
(*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
692.10 (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).
708.85 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
708.91 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
710.86 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
710.88 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
710.90 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
712.49 (*see* MOTION TO DISMISS ACTION, C.D. 4724).

CONSTRUCTION—Continued
TARIFF SCHEDULES OF THE UNITED STATES—Continued
Item—Continued
725.50 (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
727.04 (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).
727.55 (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).
732.36 (*see* COASTER BRAKES, C.D. 4721).
737.05 (*see* SHIP MODELS, C.D. 4710).
737.07 (*see* SHIP MODELS, C.D. 4710).
737.09 (*see* SHIP MODELS, C.D. 4710).
737.15 (*see* SHIP MODELS, C.D. 4710).
737.20 (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
737.40 (*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).
737.65 (*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
737.80 (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
737.90 (*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
750.40 (*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
772.97 (*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).
800.00 (*see* AMERICAN GOODS RETURNED, C.D.'s 4715, 4727).
806.20 (*see* AMERICAN GOODS RETURNED, C.D. 4715).
806.30 (*see* AMERICAN GOODS RETURNED, C.D. 4715).
807.00
(*see* AMERICAN GOODS RETURNED, C.D. 4715).
(*see* COASTER BRAKES, C.D. 4721).
912.10 (*see* COASTER BRAKES, C.D. 4721).
948.00 (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
Schedule 3
Headnote 3(a)(iii) (*see* WOMEN'S COTTON GAUZE SHIRTS, C.D. 4726).
Part 6, subpart F (*see* WOMEN's COTTON GAUZE SHIRTS, C.D. 4726).
Schedule 4
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Subpart A (*see* RIMACTANE, C.D. 4713).
Subpart B (*see* RIMACTANE, C.D. 4713).
Subpart C (*see* RIMACTANE, C.D. 4713).
Part 10, headnote 2(b) (*see* PETROLEUM DERIVATIVE, C.D. 4719).
Schedule 6
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Part 4
Subpart A
(*see* AMPUL INSPECTION MACHINES, C.D. 4716).
Headnote 1 (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).
Subpart C (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. C.D. 4709).
Subpart H (*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
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Subpart C (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
Part 3, subpart A, headnote 1 (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
Part 4, subpart A, headnote 1 (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).
Part 5
Subpart E
Headnote 1 (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).

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Part 5—Continued
Subpart E—Continued
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(*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
(*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
(*see* SHIP MODELS, C.D. 4710).
(*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).
Part 12, subpart C (*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).
Schedule 8
Headnote 1 (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Part 1
Subpart A (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Subpart B, headnote 3(b) (*see* AMERICAN GOODS RETURNED, C.D. 4715).
Technical Amendments Act of 1965, P. L. 89-241 (*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
U.S. CODE
Title 5
Sec. 701(a)(2) (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
Sec. 706(2)(A) (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
Title 19
Secs. 257, 258 (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
Sec. 1514 (1970 ed.) (*see* AMERICAN GOODS RETURNED, C.D. 4727).
Sec. 1514(b)(1)
(*see* MOTION TO DISMISS ACTION, C.D. 4724).
(*see* MOTION TO SEVER AND DISMISS, C.D.'s 4722, 4725).
Sec. 1514(c) (*see* MOTION TO DISMISS ACTION, C.D. 4724).
Sec. 1520(c) (*see* AMERICAN GOODS RETURNED, C.D. 4727).
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Sec. 1582(a) (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
Sec. 1582(c)
(*see* MOTION TO DISMISS ACTION, C.D. 4724).
(*see* MOTION TO SEVER AND DISMISS, C.D.'s 4722, 4725).
Sec. 2632(d) (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).
CROSS-MOTION FOR SUMMARY JUDGMENT
MOTION FOR SUMMARY JUDGMENT
(*see* PLATES, FOR PRINTING, C.D. 4707).
(*see* SHIP MODELS, C.D. 4710).
SUMMARY JUDGMENT, MOTION FOR (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
CUSTOMS REGULATIONS
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DRUM BRAKES (*see* COASTER BRAKES, C.D. 4721).
DUTIES, REMISSION OF
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DUTY, ENTRY FREE OF (*see* AMERICAN GOODS RETURNED, C.D. 4715).

EJUSDEM GENERIS DOCTRINE
STATUTORY CONSTRUCTION (*see* AMPUL INSPECTION MACHINES, C.D. 4716).

ELECTRIC TOOTHBRUSHES
PARTS OF ELECTRIC TOOTHBRUSHES (*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).

ELECTRICAL
ARTICLES; ELECTRICAL PARTS OF ARTICLES, NOT SPECIALLY PROVIDED FOR (*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
Toothbrushes, electric (*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
PARTS OF ARTICLES, NOT SPECIALLY PROVIDED FOR; ELECTRICAL ARTICLES (*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).

ENTIRETY
BREADSTICK PRODUCTION LINE (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).

EVIDENCE
CHIEF USE (*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).

EXCLUDED PRODUCT
"BENZENOID" PART OF SCHEDULE 4 (TSUS) (see RIMACTANE, C.D. 4713).

FAILURE OF COURT TO RULE ON EFFECT OF GENERAL INTERPRETATIVE RULE (*see* MOTION FOR REHEARING, C.D. 4714).

FREE ENTRY (*see* AMERICAN GOODS RETURNED, C.D. 4715).

"FRISKY WHISKEY BOTTLE"
TOY, "PART" OF

A certain article described as a "Frisky Whiskey Bottle" and admittedly a "part" of a practical joke article was classified under item 737.90, Tariff Schedules of the United States, as a "part" of a toy. Plaintiff claimed classification as machines not specially provided for under TSUS item 678.50. Alternatively, plaintiff claimed classification as electric parts of articles not specially provided for under TSUS item 688.40, or as practical joke articles under TSUS item 737.65.

The court held the item in issue could not be classified under the *eo nomine* provision for practical joke articles (item 737.65) since that provision does not provide for "parts" of practical joke articles; that plaintiff's alternative claims under items 678.50 and 688.40, which were for articles not specially provided for elsewhere in the schedules, are basket provisions, and therefore less specific than the provision for "parts" of toys under which classification was made; and, under General Interpretative Rule 10(ij), a tariff provision will prevail over a "parts" provision only if it is a specific provision which describes the merchandise.

Plaintiff's contention that the item in issue was not a plaything, and that toys chiefly used for amusement were chiefly playthings, was found to be without merit. The court determined that the merchandise had been properly classified. Accordingly, the protest was overruled. *Henry A. Wess, Inc.*, C.D. 4706 ---------- 6

FURNITURE (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).

GAS CHROMATOGRAPH PARTS (*see* MOTION TO DISMISS ACTION, C.D. 4724).

GENERAL INTERPRETATIVE RULE, FAILURE OF COURT TO RULE ON EFFECT OF (*see* MOTION FOR REHEARING, C.D. 4714).

GOVERNMENT'S CLASSIFICATION ERRONEOUS
BURDEN OF PROOF (*see* AMPUL INSPECTION MACHINES, C.D. 4716).

INDUSTRIAL
MACHINERY FOR PREPARING AND MANUFACTURING FOOD OR DRINK; CHIEF USE (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).

INDUSTRIAL—Continued Page
OVENS, NON-ELECTRIC
BAKERY OVEN
The subject merchandise, a bakery oven, was held to have been properly classified under the provision in item 661.30, Tariff Schedules of the United States, for industrial ovens, non-electric, and parts thereof, rather than under the provision in item 666.25, TSUS, for industrial machinery for preparing and manufacturing food or drink and parts thereof, claimed by plaintiff. The court held that as between the two competing provisions, Congress had clearly manifested its intent in headnote 1, part 4A, schedule 6, TSUS, that industrial ovens (i.e. bakery ovens) be classified in part 4A, schedule 6, where item 661.30 appears, rather than in part 4C, schedule 6, where item 666.25 is found. Accordingly, plaintiff's action was dismissed. *Stella D'Oro Biscuit Co., Inc.*, C.D. 4709 28
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–28.
V. industrial machinery for preparing and manufacturing food or drink; relative specificity (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION
SECRETARY OF TREASURY, DISCRETIONARY AUTHORITY TO REMIT REPAIR DUTIES (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).

JURISDICTION (*see* AMERICAN GOODS RETURNED, C.D. 4715).

LACK OF JURISDICTION, MOTION TO DISMISS FOR
(*see* MOTION TO DISMISS ACTION, C.D. 4724).
(*see* MOTION TO SEVER AND DISMISS, C.D.'s 4722, 4725).

LEGISLATIVE HISTORY
BRUSSES NOMENCLOTURE, 1955, HEADING 94.02 (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).
EXPLANATORY NOTE: TE THE BRUSSELS NOMENCLOTURE, 1955, VOL. III
Heading 84.14 (p. 791) (*see* INDUSTRIAL OVENS, NON-ELECTRIC, C.D. 4709).
Heading 90.16 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
HOUSE REPORT
No. 7, 71st Cong., 1st Sess. (1929) (*see* MOTION TO DISMISS ACTION, C.D. 4724).
No. 342, 89th Cong., 1st Sess. (1965), p. 44 (*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
REPORT OF THE HOUSE COMMITTEE ON WAYS AND MEANS, H.R. No. 7, 71st Cong., 1st Sess. 171 (1929) (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
SENATE FINANCE COMMITTEE REPORT (SENATE REPORT No. 91–1536 ON H.R. 19670, 91ST CONG., 2D SESS. (1970)) (*see* COASTER BRAKES, C.D. 4721).
SENATE HEARINGS ON H.R. 2667, 71ST CONG., 1ST SESS., VOL. XVII, 537–46 (1929) (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
SENATE REPORT
No. 37, 71st Cong., 1st Sess. 72 (1929) (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
No. 530, 89th Cong., 1st Sess. (1965), p. 33 (*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
No. 91–576, 91st Cong., 1st Sess. pp. 10–12 (1969) (*see* MOTION TO SEVER AND DISMISS, C.D. 4722).
SUMMARIES OF TRADE AND TARIFF INFORMATION (TSUS)
1968, schedule 7, vol. 4, p. 172 (*see* SHIP MODELS, C.D. 4710).
1969, schedule 6, vol. 8 (*see* PLATES, FOR PRINTING, C.D. 4707).
1970, schedule 7, vol. 2, p. 155 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
SUMMARY OF TARIFF INFORMATION 1921 (*see* PLATES, FOR PRINTING, C.D. 4707).
TARIFF ACT OF 1913, PAR. 137 (*see* PLATES, FOR PRINTING, C.D. 4707).
TARIFF ACT OF 1922, PAR. 341 (*see* PLATES, FOR PRINTING, C.D. 4707).

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TARIFF ACT OF 1930, PAR. 341 (*see* PLATES, FOR PRINTING, C.D. 4707).
TARIFF CLASSIFICATION STUDY, 1960
Explanatory and Background Materials
Schedule 3, page 7 (*see* WOMEN'S COTTON GAUZE SHIRTS, C.D. 4726).
Schedule 7
p. 150 (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
(*see* SHIP MODELS, C.D. 4710).
Schedule 8, part 1, subpart B, pp. 13–15 (*see* AMERICAN GOODS RETURNED, C.D. 4715).
First Supplemental Report, 1962, p. 81 (*see* SHIP MODELS, C.D. 4710).
Seventh Supplemental Report (1963) (*see* WOMEN'S COTTON GAUZE SHIRTS, C.D. 4726).
Submitting Report (Interim Report 1955) (*see* SHIP MODELS, C.D. 4710).
3 U.S. CODE CONG. & AD. NEWS 6115 (1970) (*see* COASTER BRAKES, C.D. 4721).
UNITED STATES TARIFF COMMISSION, ECONOMIC FACTORS AFFECTING THE USE OF ITEMS 807.00 AND 806.30 OF THE TSUS, REPORT TO THE PRESIDENT ON INVESTIGATION NO. 332–61, AT PP. 15–20 (TC PUBLICATION 339, SEPT. 1970) (*see* AMERICAN GOODS RETURNED, C.D. 4715).
LIDS FOR GLASS JARS (*see* AMERICAN GOODS RETURNED, C.D. 4715).
MACHINES, NOT SPECIALLY PROVIDED FOR
(*see* AMPUL INSPECTION MACHINES, C.D. 4716).
(*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
PARTS OF MACHINES, NOT SPECIALLY PROVIDED FOR
(*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
(*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
MARINE CLEANSER (*see* AMERICAN GOODS RETURNED, C.D. 4727).
"MORE THAN" DOCTRINE (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
MOTION
FOR REHEARING; FAILURE OF COURT TO RULE ON EFFECT OF GENERAL INTERPRETATIVE RULE
Plaintiff filed a motion for rehearing of *Crabtree Vickers, Inc.* v. *United States*, 79 Cust. Ct. 13, C.D. 4707 (1977) on the sole basis that the court did not rule expressly on the effect of General Interpretative Rule 10(h) pertaining to classification of articles whether finished or not finished contending for the first time on rehearing that General Interpretative Rule 10(h) superseded any legislative ratification "for the simple reason that such proscriptions for classification of unfinished articles must appear in the context of the provision and not solely by way of judicial construction of legislative intent."
The court found no merit in plaintiff's novel position which would have the effect of nullifying judicial construction of legislative intent and held that the imported merchandise in this case could not be considered to be an unfinished article for the purposes of item 668.38, Tariff Schedules of the United States. Accordingly, plaintiff's motion was denied. *Crabtree Vickers, Inc.*, C.D. 4714----- 60
FOR SUMMARY JUDGMENT
Cross-motion for summary judgment
(*see* PLATES, FOR PRINTING, C.D. 4707).
(*see* SHIP MODELS, C.D. 4710).
Summary judgment, motion for (*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).
(*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
TO DISMISS ACTION
Separate protests covering the same entry
Defendant moved to dismiss a certain action for lack of subject matter jurisdiction on the ground that the protest was not timely

MOTION—Continued Page
TO DISMISS ACTION—Continued
Separate protests covering the same entry—Continued
filed, and that at the time it was filed a previous protest covering the same entry had been made.
The merchandise had been appraised with an advance from the entered value and classified under item 712.49, Tariff Schedules of the United States. The entry was also subjected to a supplemental duty pursuant to Presidential Proclamation 4074. Plaintiff's protest contested only the validity of the supplemental duty. After denial, a timely summons was filed. The Customs Service then reliquidated the entry, reducing the appraised value of the merchandise to the entered value. Plaintiff filed a second protest which again challenged only the validity of the supplemental duty. That protest was denied and a summons filed contesting the denial of the second protest.
The court held that the filing of a protest by plaintiff against the reliquidation of the regional commissioner again challenging the validity of Presidential Proclamation 4074, must be regarded as the filing of a second protest on the same entry of merchandise contrary to the provisions of 19 U.S.C., sec. 1514(b)(1). Accordingly, defendant's motion to dismiss was granted. *Ataka America, Inc.*, C.D. 4724 ---------- 135
Timeliness of protest (*see* MOTION TO DISMISS ACTION, C.D. 4724).
TO EXTEND TIME TO ANSWER COMPLAINT (*see* MOTION TO SEVER AND DISMISS, C.D. 4722).
TO SEVER AND DISMISS
Separate protests involving the same entry
Defendant moved for an order severing and dismissing this action as to two entries on the ground of lack of jurisdiction, predicated on the alleged invalidity under 19 U.S.C., sec. 1514(b)(1) of the second protests filed in connection with those entries, respecting the same category of merchandise as was the subject of the prior protests. Defendant also requested an extension of time within which to answer the complaint. Plaintiff interposed an opposition to the motion to sever and dismiss, but did not oppose defendant's application for an extension of time.
The court held that in view of sec. 1514(b)(1) and 28 U.S.C., sec. 1582(c) only one protest may be filed for each entry covering the same category of merchandise. Accordingly, the action was severed and dismissed as to the merchandise covered by the aforesaid entries. Defendant's time to answer plaintiff's complaint was extended to and including 30 days after entry of order. *Russ Togs, Inc.*, C.D. 4722---------- 119
Defendant moved for an order severing one entry covered by an action and dismissing the action as to that entry for lack of jurisdiction, predicated on the alleged invalidity under 19 U.S.C., sec 1514(b)(1) of the second protest filed in connection with the entry respecting a category of merchandise that was the subject of a prior protest.
The court held that in view of the statutory proscription of multiple protests, plaintiff's second protest was improperly filed and ordered that the action be severed and dismissed as to that entry. *Webcor Electronics*, C.D. 4725---------- 137
MOTOR
FUEL (*see* PETROLEUM DERIVATIVE. C.D. 4719).
VEHICLES (*see* MOTORIZED WHEELCHAIRS, C.D. 4720).
MOTORIZED WHEELCHAIRS
MOTOR VEHICLES
Certain motorized wheelchairs, classified as furniture under item 727.55, Tariff Schedules of the United States, were claimed to be classifiable under TSUS item 692.10 as motor vehicles. Defendant sought to blunt plaintiff's claim with an alternative claim that if the mer-

MOTORIZED WHEELCHAIRS—Continued Page
MOTOR VEHICLES—Continued
chandise was not dutiable under item 727.55, it was properly classifiable under TSUS item 727.04 as furniture, designed for hospital and medical use.
Finding that the importations were lightweight portable wheelchairs, that can proceed to speeds up to four miles per hour, are used both indoors and outdoors, are suitable for highway and street travel (except for street and intersection crossing), and give persons unable to walk a certain amount of independence and ability to get from place to place without assistance, the court held that they are in the unlimited tariff sense provided for in TSUS—"Motor vehicles * * * for transport of persons". Accordingly, plaintiff's claim under TSUS item 692.10 was sustained. *Abbey Rents*, C.D. 4720 ---------- 103
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 78–4.
MUSIC BOXES (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
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OPTICAL MEASURING OR CHECKING INSTRUMENTS AND APPLIANCES, OTHER (*see* AMPUL INSPECTION MACHINES, C.D. 4716).
ORNAMENTED FABRICS (*see* WOMEN'S COTTON GAUZE SHIRTS, C.D. 4726).
OTHER CHRISTMAS ORNAMENTS (*see* VINYL REINDEER AND SANTA CLAUS FIGURES, C.D. 4717).
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MACHINES, NOT SPECIALLY PROVIDED FOR
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(*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).
PRACTICAL JOKE ARTICLES (*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).
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PETROLEUM DERIVATIVE
MOTOR FUEL
Certain importations of petroleum derivations, classified as motor fuel under item 475.25, Tariff Schedules of the United States, were claimed to be classifiable as naphtha under TSUS item 475.35.
On the record presented, the court found the testimony adduced did not satisfactorily connect the samples and tests performed by plaintiffs with the importations; the samples and tests performed by customs were presumed to be correct. Plaintiffs having failed to overcome the presumption of correctness attaching to the classification, the importations were held properly classified as motor fuel under item 475.25. Accordingly, the action was dismissed. *J. D. Smith Interocean, Inc., et al.*, C.D. 4719 ---------- 99
PLATES FOR PRINTING
ALUMINUM PLATES COATED WITH PHOTOSENSITIVE PLASTIC
Both parties moved for summary judgment pursuant to rule 8.2 of the court. Certain aluminum plates coated with a photosensitive plastic were classified as parts of printing machinery under item 668.50 of the Tariff Schedules of the United States and were claimed to be properly classifiable as steel plates, engraved and otherwise prepared for printing under item 668.38 of the tariff schedules.
The court held that the involved plates in the condition imported cannot be used for printing since they required further processing

PLATES FOR PRINTING—Continued Page
ALUMINUM PLATES COATED WITH PHOTOSENSITIVE PLASTIC—Continued
and therefore are not the plates Congress intended to provide for in item 668.38 and plaintiff's claim was therefore overruled. Accordingly, plaintiff's motion for summary judgment was denied and defendant's cross-motion for summary judgment was granted. *Crabtree Vickers, Inc.*, C.D. 4707 13
Motion for rehearing denied September 23, 1977 (C.D. 4714).

PLEADINGS, AMENDMENT OF (*see* MOTION TO SEVER AND DISMISS, C.D. 4725).

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REMISSION OF DUTIES, SHIP REPAIRS
ADMINISTRATIVE ACTION, SCOPE OF JUDICIAL REVIEW
Plaintiff steamship company brought this action to recover customs duties paid on certain repairs made in foreign ports to the "S. S. Volusia", maintaining that the duties should have been remitted by the Secretary of the Treasury because the foreign repairs were the result of a casualty. Contending that there was no genuine issue of fact which required a trial, defendant moved for summary judgment pursuant to rule 8.2 of the court. Since plaintiff did not controvert the facts stated in defendant's motion, those facts were deemed admitted under rule 8.2(b).
The evidence presented to the Secretary failed to establish that the salting of the vessel's boilers, which necessitated repairs, occurred "with the violence of the turbulent forces of nature," or from any analogous circumstances. The court held that it was plain that the damage was directly attributable to the negligence of the vessel's chief engineer rather than a "casualty" within the meaning of section 466 of the Tariff Act of 1930, 19 U.S.C. § 258(1). Therefore, it was reasonable for the Secretary of the Treasury to conclude that the negligence did not justify remission under the statute, and that the Secretary acted reasonably, and did not abuse his discretion by refusing to remit the duties on the foreign repairs to the vessel. Since the administrative action under review was not shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the defendant's motion for summary judgment was granted. *Suwannee Steamship Company*, C.D. 4708 19

REQUEST FOR RELIQUIDATION, UNTIMELY (*see* AMERICAN GOODS RETURNED, C.D. 4727).

RIMACTANE Page

BENZENOID STRUCTURE

A certain antibiotic drug with the trademark of Rimactane was classified under item 407.85 of the Tariff Schedules of the United States (in the "benzenoid" part of schedule 4) as a drug obtained, derived or manufactured from a product provided for in schedule 4, part 1A or 1B, and was claimed to be classifiable under TSUS item 437.32 as an antibiotic processed beyond the natural state.

The court agreed with the defendant's position that if, in the production of a cyclic organic chemical product, the original natural benzenoid structure is modified to become a quinoid structure the later reversion to benzenoid structure is a synthesis; and held that the product was not entitled to the exclusionary effect of headnote 3 to part 1 of schedule 4, TSUS, which is limited to products whose relevant structures have remained intact from the time of their first natural occurrence. Judgment was entered accordingly. *Ciba-Geigy Corporation*, C.D. 4713 53

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 78–1.

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SHAPE AND SIZE, CONFLICTING EVIDENCE

SAMPLES (*see* CHILI PEPPERS, C.D. 4711).

SHIP

MODELS; TIN PLATE, ARTICLES OF

This action was before the court on cross-motions for summary judgment. Certain metal sailing ship items were classified as other models under item 737.15 of the Tariff Schedules of the United States, and were claimed to be properly classifiable as articles of tin plate under item 657.15 of the tariff schedules. The parties agreed that the importations were wholly or in chief value of tin plate, were not chiefly used for the amusement of children or adults, and were not toys.

Based upon the record presented, lexicon definitions and congressional intent, the court held that the imported merchandise was properly classified under item 737.15. Accordingly, plaintiff's motion for summary judgment was denied and defendant's cross-motion for summary judgment was granted. *Lohzin & Born, Inc.*, C.D. 4710 34

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(*see* REMISSION OF DUTIES, SHIP REPAIRS, C.D. 4708).

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(*see* UNFINISHED TOOTHBRUSHES, C.D. 4705).

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TOYS
HAVING A SPRING MECHANISM
Dolls (*see* TOYS HAVING A SPRING MECHANISM, C.D. 4723).
Music boxes

Certain articles invoiced as "Lucite Musical Dancing Couple in plastic Dome" were classified as toys having a spring mechanism under item 737.80, Tariff Schedules of the United States, and were claimed to be classifiable as music boxes under TSUS item 725.50. Alternatively, plaintiff claimed that the articles should have been severed for classification purposes and that the music box portion, with or without the plastic dome, should have been classified as music boxes under item 725.50, while the figures, with or without plastic dome, should have been classified as dolls under item 737.20. Cross-motions for summary judgment were filed by plaintiff and defendant.

On the record presented the court held (1) that the imported articles were erroneously classified by the government as toys; (2) that the articles are not classifiable as music boxes, as claimed by plaintiff, but are "more than" music boxes; and (3) that the articles are entireties and hence not severable for classification purposes. Accordingly, plaintiff's motion for summary judgment was denied, defendant's cross-motion was granted, and the action was dismissed without affirming the government's classification. *Amico, Inc.*, C.D. 4723 125

Rehearing denied January 25, 1978.

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 78-6.

NOT SPECIALLY PROVIDED FOR; PARTS OF TOYS (*see* "FRISKY WHISKEY BOTTLE", C.D. 4706).

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ARTICLE (*see* MOTION FOR REHEARING, C.D. 4714).

TOOTHBRUSHES; BROXODENT DEVICES (ELECTRIC TOOTHBRUSHES)

Certain merchandise described on the invoices as "Broxodent devices (electric toothbrushes)" consisting of the power or motor units of Broxodent electric toothbrushes, without brushheads, was classified under the provision in item 750.40 of the Tariff Schedules of the United States for "Tooth brushes", and was claimed to be classifiable as "Electric articles, and electrical parts of articles, not specially provided for" under TSUS item 688.40, or alternatively under TSUS item 678.50 as "Machines not specially provided for, and parts thereof."

Based on the record presented and congressional intent, the court held that the merchandise was properly classified under TSUS item 750.40, as unfinished toothbrushes pursuant to General Interpretative Rule 10(h), and that the absence of a brushhead, comprising one percent of the cost of a complete Broxodent electric toothbrush, did not preclude classification of the imports as unfinished toothbrushes. Since there was no express provision in the tariff schedules for parts of toothbrushes which would be rendered ineffectual by classifying the imports as unfinished toothbrushes, and the competition was between an *eo nomine* provision for toothbrushes (unfinished) and the basket provisions in TSUS items 688.40 and 678.50, the court also held that the rationale applied in *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109 (1973), to distinguish parts of furniture from unfinished furniture was not dispositive in the present case. Accordingly, plaintiff's action was dismissed. *E. R. Squibb & Sons, Inc.*, C.D. 4705 ---------- 1

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77-27.

UNTIMELINESS OF CLAIM (*see* AMERICAN GOODS RETURNED, C.D. 4727).

VINYL REINDEER AND SANTA CLAUS FIGURES

OTHER CHRISTMAS ORNAMENTS

Certain inflatable vinyl reindeer and Santa Claus figures classified as other toy figures of animate objects (except dolls), not having a spring mechanism, not stuffed, and not wholly or almost wholly of metal, under item 737.40, Tariff Schedules of the United States, were claimed to be classifiable as other Christmas ornaments of rubber or plastics under TSUS item 772.97.

Finding that the imported articles were similar in all material respects to the figures involved in the incorporated case of *Davis Products, Inc., Frank M. Chichester* v. *United States*, 59 Cust. Ct. 226, C.D. 3127 (1967), in which case the imported figures were found to be articles of Christmas display decorations and not toys, the court sustained plaintiff's claim. *L. B. Watson Co., a/c Murphy Reir, Inc.*, C.D. 4717 ---------- 85

WHEEL HUBS (*see* COASTER BRAKES, C.D. 4721).

WOMEN'S COTTON GAUZE SHIRTS

ORNAMENTED FABRICS

Certain women's gauze shirts, classified as "Women's wearing apparel * * * and other women's * * * wearing apparel, ornamented: Of cotton" under item 382.00, Tariff Schedules of the United States, were claimed to be classifiable under TSUS item 382.33, the provision for women's, girls', or infants' wearing apparel, not ornamented.

In considering whether tucking on the pockets of the shirts caused the merchandise to be "ornamented" within the purview of item 382.00, the court found that no testimony, other than the unsupported personal opinion of plaintiff's witnesses, had been offered to indicate that the merchandise was not ornamented in any accepted trade sense. It held that plaintiff had not overcome the presumption of correctness attached to the classification and that the merchandise had been properly classified under item 382.00. *Excelsior Import Associates, Inc.*, C.D. 4726 ---------- 144

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BRAID (*see* WOMEN'S COTTON GAUZE SHIRTS, C.D. 4726).
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Collateral estoppel—A decision in which the appraised value of merchandise is allowed to remain in effect, not as the result of a finding as to its correctness, but because plaintiff, after proving the error of the appraisement, fails to prove the correct value, does not estop plaintiff in a later case from litigating the issue of the correct value of identical merchandise imported under identical circumstances. *J. E. Bernard & Co., Inc.* v. *United States*, 66 Cust Ct. 545, R.D. 11739, 324 F. Supp. 496 (1971) distinguished. *Arnold Pickle & Olive Co.*, C.D. 4712 50

Constructed value/cost of production—general expenses and profit—Merchandise consisting of single-speed bicycle rear wheel hubs incorporating coaster brakes and automotive ignition contact sets exported from Mexico was appraised (a) as to the wheel hubs, on the basis of constructed value as defined in section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, and (b) as to the contact sets, on the basis of cost of production as defined in section 402 a(f), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. It is claimed that the items of start-up and preproduction costs and profit, in the case of the wheel hubs, and the items of start-up and preproduction costs and research and development costs, in the case of the contact sets, were improperly added in the appraisement of said merchandise. *Held* that the merchandise was properly appraised in the absence of evidence establishing that disputed additions to the element of general expenses and to the element of profit, are not part of the usual general expenses and profit added by Mexican producers of merchandise of the same general character for exportation to the United States or by Mexican producers of such and similar merchandise. *The Bendix Corporation*, C.D. 4721 108

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Appealed to U.S. Court of Customs and Patent Appeals, Appeal 78–2.

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MOTION
FOR ASSIGNMENT OF ACTION TO THREE-JUDGE PANEL
Judge, single
Pursuant to 28 U.S.C. § 255 (1970), plaintiff, an American manufacturer, moved for the assignment of the herein action to a three-judge panel (1) to determine whether the court had subject matter jurisdiction of an action brought by plaintiff challenging the cor-

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FOR ASSIGNMENT OF ACTION TO THREE-JUDGE PANEL—Continued

Judge, single—Continued

rectness of a negative injury determination made by the International Trade Commission under the Antidumping Act of 1921, as amended, and (2) to decide the substantive question whether the International Trade Commission, in reaching its determination, misconstrued and misapplied the pertinent statutes. Defendant concurred in plaintiff's motion on the jurisdictional question, but opposed assigning a three-judge panel to hear and determine the merits of the action. The importer of record and consignee of the imported merchandise, who was the party-in-interest, agreed with defendant's position.

The chief judge, in denying plaintiff's motion, rejected plaintiff's contention that the action involved "broad or significant implications in the administration or interpretation of the customs laws", and held that in the absence of a showing of special factors or circumstances that warrant the designation of a three-judge panel, the judicial power of the Customs Court shall be exercised by a single judge. *SCM Corporation*, C.R.D. 77–6 ---------- 163

FOR ORDER AUTHORIZING TAKING OF DEPOSITIONS AND FOR FURTHER DISCOVERY

Plaintiff having previously obtained the names of those involved in the formulation of ORR Ruling 202–71 by virtue of the Customs Courts' order of March 8, 1976 (*Way Distributors, Inc.* v. *United States*, 76 Cust. Ct. 273, C.R.D. 76–1) moved to depose Arthur P. Schifflin, Acting Director, Division of Tariff Classification Rulings and Customs Chemist Irving Sporn, and for an Order requiring defendant United States to produce any available samples, books, worksheets, standard texts, treatises, guides, and any other tangible things pertaining to the classification and assessment of duty of the merchandise involved in the instant action, and not previously produced.

In granting plaintiff's motion, the court ordered *inter alia* that the defendant shall cause both employees to appear for purposes of taking depositions in the United States Customs Court on September 26, 1977 at 11 a.m. or at a date, time and place mutually agreed to by counsel after consultation with the court; and that defendant produce for use in said examination the aforesaid material requested by the plaintiff. *Way Distributors, Inc.*, C.R.D. 77–10 ---------- 174

FOR SEVERENCE

Plaintiff moved for an order severing a protest from this civil action: defendant opposed motion. Plaintiff averred that all entries covered by the civil action presented a common question of law as to whether the merchandise was properly classifiable as medical optical instruments under item 709.05, Tariff Schedules of the United States, or as electro-medical apparatus under item 709.17, TSUS. Plaintiff believed that the model GIF–D fiberscope was the most representative of the involved merchandise. That model was covered by the protest for which severance was requested and had been the subject of *United States* v. *Ataka America, Inc.*, 64 CCPA 60, C.A.D. 1184, 550 F. 2d 33 (1977), *reh. denied* May 5, 1977, decided adversely to plaintiff. Plaintiff alleged that it intended to retry the issue in *Ataka*; and without severance, it would be required to introduce at trial testimony and expensive samples covering each of the individual models. Defendant contended that the prior *Ataka* case was *stare decisis;* that the still extant issue of the proper classification of model numbers other than the GIF–D would not be resolved, but prolonged while a retrial was sought on the GIF–D; and noted that the present action was currently suspended under the prior *Ataka* case.

The court held that the doctrine of *stare decisis* was not a bar to retrial and that severance would serve the interests of justice. Accordingly, plaintiff's motion was granted. *Ataka America, Inc.*, C.R.D. 77–8 ---------- 171

MOTION—Continued

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FOR SEVERENCE—Continued

Plaintiff moved for an order severing a protest from this civil action; defendant opposed motion. Plaintiff averred that all entries covered by the civil action presented a common question of law as to whether the merchandise was properly classifiable as medical optical instruments under item 709.05, Tariff Schedules of the United States, or as electro-medical apparatus under item 709.17, TSUS. Plaintiff had tried a test case involving model GIF–D, which was decided adversely to plaintiff. (*United States* v. *Ataka America, Inc.*, 64 CCPA 60, C.A.D. 1184, 550 F. 2d 33 (1977), *reh. denied* May 5, 1977.) Plaintiff now desires to retry the issue of the prior *Ataka* case, and as part of the retrial, seeks not only to present testimony relative to model GIF–D, but also respecting model GIF–D3, which it stated was representative of more recent instruments in the fiber optic medical instruments field. Plaintiff alleged that without the requested severance, it would be required to introduce testimony and expensive samples concerning each of the individual models.

In opposing the motion defendant urged that the prior *Ataka* case was *stare decisis;* and stated that the protest which plaintiff wanted severed was not alleged to cover merchandise other than the GIF–D, and that model GIF–D3 was admittedly not part of the importation upon which plaintiff seeks retrial.

The court, holding that the requested severance would serve the interests of justice, granted plaintiff's motion. *Ataka America, Inc.*, C.R.D. 77–9 172

FOR SUMMARY JUDGMENT

Certain articles of wearing apparel were appraised on the basis of constructed value as defined in section 402(d) of the Tariff Act of 1930, as amended, at 25% above the invoice prices. Plaintiff made alternative claims of export value as defined in section 402(b) of the Tariff Act of 1930, as amended, and constructed value, both equal to the invoice unit prices; and, moved for summary judgment pursuant to Rule 8.2 of the Rules of the U.S. Customs Court.

The court held that although the error of the appraisement was apparent from the failure to follow the formula contained in section 402(d) of the Tariff Act of 1930, plaintiff's evidence fell short of demonstrating the absence of issues of material fact. Inasmuch as there was not sufficient evidence to warrant the granting of summary judgment on either of the alternative claims, the motion was denied. *G. Cosimano*, C.R.D. 77–7 168

TO DISMISS

Action: failure of complaint to state a claim upon which relief may be granted

Pursuant to Rule 4.7(b) of the Rules of the U.S. Customs Court defendant moved to dismiss a certain action for failure of the complaint to state a claim upon which relief may be granted. Plaintiff filed a memorandum in opposition.

The court noted that the issue for determination was whether certain mirror tiles had a reflecting area of over one square foot. The complaint alleged *inter alia* that the mirror had measured "12$\frac{1}{16}$ inches square in total surface area" and that the merchandise was properly dutiable under item 544.54, Tariff Schedules of the United States, as modified, which required that mirrors provided for therein be over one square foot in reflecting area.

The court found that although the factual allegation of the complaint with reference to reflecting area had been drafted somewhat inartistically, it was reasonably clear from the pleading that plaintiff was alleging that the mirror tiles measured 12$\frac{1}{16}$ inches on each side and was claiming the mirror tiles were over one square foot in reflecting area. Accordingly, it held that plaintiff had stated a claim upon which relief may be granted. In denying defendant's motion to dismiss the action, the court pointed out that if defendant wished greater specificity or further delineation of the facts, the

MOTION—Continued
To DISMISS—Continued Page
appropriate step would have been a motion pursuant to Rule 4.7(d) to make more definite and certain. *International Mercantile Corp.*, C.R.D. 77–11 175
For lack of jurisdiction; failure to file timely application for reliquidation
Defendant moved pursuant to rule 4.7(b)(2) to dismiss a certain action for lack of subject matter jurisdiction on the ground that plaintiff failed to comply with the provisions of sec. 520(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C., sec. 1520(c)(1), and, therefore, that its protest was a nullity. Plaintiff filed an opposition to defendant's motion.
Finding that plaintiff had filed its application for reliquidation pursuant to sec. 520(c)(1); that the protest was properly filed and denied; that a timely summons was filed; and that all liquidated duties had been paid, the court held that it had jurisdiction over the subject matter of this action. Accordingly, defendant's motion was denied without prejudice. *Feudor, Inc.*, C.R.D. 77–13 179
To STRIKE "SECOND AMENDED COMPLAINT"; FAILURE TO COMPLY WITH COURT RULES
Defendant moved for an order striking plaintiff's "Second Amended Complaint" on the ground that it failed to comply with court rules. Plaintiff interposed an opposition to defendant's motion. Previously the court had entered an order directing severance of two entries covered by a certain civil action and further ordered the filing of an amended complaint within a time specified. Plaintiff thereupon filed a document erroneously entitled "Second Amended Complaint", which failed to repeat retained portions of the original complaint.
The court held that even though the purpose of the amended pleading was simply to delete certain material from a prior pleading, nevertheless such amended pleading must conform with rule 4.8(c) of the Rules of the United States Customs Court, pursuant to which the amended pleading should reproduce or duplicate sufficient material retained from the original or prior pleading so as to clearly indicate within the four corners of the amended pleading how the pleading is to stand amended. Finding that plaintiff's so-called second amended complaint, which in fact was the first amended complaint, failed to do so, the court granted defendant's motion and directed plaintiff to file a second amended complaint in the form and manner prescribed by rule 4.8(c). *Webcor Electronics Div. of U.S. Industries, Inc.*, C.R.D. 77–12 177
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 77–6.
PROOF, INSUFFICIENT
CONSTRUCTED VALUE (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 77–7).
EXPORT VALUE (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 77–7).
RELIQUIDATION, APPLICATION FOR (*see* MOTION TO DISMISS FOR LACK OF JURISDICTION, C.R.D. 77–13).
RETRIAL OF ISSUE
STARE DECISIS (*see* MOTION FOR SEVERANCE, C.R.D.'s 77–8, 77–9).
SEVERANCE, MOTION FOR (*see* MOTION FOR SEVERANCE, C.R.D.'s 77–8, 77–9).
SINGLE-JUDGE TRIALS
THREE-JUDGE TRIALS (*see* MOTION FOR ASSIGNMENT OF ACTION TO THREE-JUDGE PANEL, C.R.D. 77–6).
STARE DECISIS
RETRIAL OF ISSUE (*see* MOTION FOR SEVERANCE, C.R.D.'s 77–8, 77–9).

SUMMARY JUDGMENT, MOTION FOR (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 77–7).
THREE-JUDGE TRIALS
SINGLE-JUDGE TRIALS (*see* MOTION FOR ASSIGNMENT OF ACTION TO THREE-JUDGE PANEL, C.R.D. 77–6).